Calendar No. 349

98TH CONGRESS
1st Session

SENATE

REPORT
No. 98–223

SENTENCING REFORM ACT OF 1983

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

S. 668

together with

ADDITIONAL AND MINORITY VIEWS

SEPTEMBER 14 (legislative day, SEPTEMBER 12), 1983.—Ordered to be printed

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REPORT
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SENTENCING REFORM ACT OF 1983

SEPTEMBER 14 (legislative day, SEPTEMBER 12), 1983.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 668]

The Committee on the Judiciary, to which was referred the bill (S. 668) to reform Federal criminal sentencing procedures, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill as amended do pass.

AMENDMENT

Strike out all after the enacting clause and insert the following:

That this Act may be cited as the "Sentencing Reform Act of 1983".

SEC. 2. (a) Title 18 of the United States Code is amended by—

(1) redesignating sections 3577, 3578, 3579, 3580, 3611, 3612, 3615, 3617, 3618, 3619, 3620, and 3656 as sections 3661, 3662, 3663, 3664, 3665, 3666, 3667, 3668, 3669, 3670, 3671, and 3672 of a new chapter 232 of title 18 of the United States Code, respectively;

(2) repealing chapters 227, 229, and 231 and substituting the following new chapters:

"CHAPTER 227—SENTENCES

"Subchapter
"A. General Provisions 3551
"B. Probation 3561
"C. Fines 3571
"D. Imprisonment 3581

"SUBCHAPTER A—GENERAL PROVISIONS

"Sec.
"3551. Authorized sentences.
"3552. Presentence reports.
"3553. Imposition of a sentence.
"3554. Order of criminal forfeiture.
"3555. Order of notice to victims.
"3556. Order of restitution.
"3557. Review of a sentence.
"3558. Implementation of a sentence.
"3559. Sentencing classification of offenses.

"SUBCHAPTER A—GENERAL PROVISIONS

"§ 3551. Authorized sentences

"(a) In General.—Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

"(b) Individuals.—An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

"(1) a term of probation as authorized by subchapter B;

"(2) a fine as authorized by subchapter C; or

"(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by sections 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

"(c) Organizations.—An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

"(1) a term of probation as authorized by subchapter B; or

"(2) a fine as authorized by subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

"§ 3552. Presentence reports

"(a) Presentence Investigation and Report by Probation Officer.—A United States probation officer shall make a presentence investigation of a defendant that is required pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, and shall, before the imposition of sentence, report the results of the investigation to the court.

"(b) Presentence Study and Report by Bureau of Prisons.—If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a misdemeanor or felony, it may order a study of the defendant. The study shall be conducted in the local community by qualified consultants unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau of Prisons or there are no adequate professional resources available in the local community to perform the study. The period of the study shall take no more than sixty days. The order shall specify the additional information that the court needs before determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for the offense committed. The study shall inquire into such matters as are specified by the court and any other matters that the Bureau of Prisons or the professional consultants believe are pertinent to the factors set forth in section 3553(a). The period of the study may, in the discretion of the court, be extended for an additional period of not more than sixty days. By the expiration of the period of the study, or by the expiration of any extension granted by the court, the United States marshal shall return the defendant to the court for final sentencing. The Bureau of Prisons or the professional consultants shall provide the court with a written report of the pertinent results of the study and make to the court whatever recommendations the Bureau or the consultants believe will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau or the consultants concerning the guidelines and policy statements, promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994(a), that they believe are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under this chapter.

"(c) PRESENTENCE EXAMINATION AND REPORT BY PSYCHIATRIC OR PSYCHOLOGICAL EXAMINERS.—If the court, before or after its receipt of a report specified in subsection (a) or (b) desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, it may order that the defendant undergo a psychiatric or psychological examination and that the court be provided with a written report of the results of the examination pursuant to the provisions of section 4247.

"(d) DISCLOSURE OF PRESENTENCE REPORTS.—The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant.

"§ 3553. Imposition of a sentence

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court, in determining the particular sentence to be imposed, shall consider—

"(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

"(2) the need for the sentenced imposed—

"(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

"(B) to afford adequate deterrence to criminal conduct;

"(C) to protect the public from further crimes of the defendant; and

"(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

"(3) the kinds of sentences available;

"(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

"(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced; and

"(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

"(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.

"(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

"(1) is of the kind, and within the range, described in subsection (a)(4), the reason for imposing a sentence at a particular point within the range; or

"(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the sentence does not include an order of restitution, the court shall include in the statement the reason therefor. The clerk of the court shall provide a transcription of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

"(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE OR RESTITUTION.—Prior to imposing an order of notice pursuant to section 3555, or an order of restitution pursuant to section 3556, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

"(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

"(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

"(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

"§ 3554. Order of criminal forfeiture

"The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

"§ 3555. Order of notice to victims

"The court, in imposing a sentence on a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices, may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant give reasonable notice and explanation of the conviction, in such form as the court may approve, to the victims of the offense. The notice may be ordered to be given by mail, by advertising in designated areas or through designated media, or by other appropriate means. In determining whether to require the defendant to give such notice, the court shall consider the factors set forth in section 3553(a) to the extent that they are applicable and shall consider the cost involved in giving the notice as it relates to the loss caused by the offense, and shall not require the defendant to bear the costs of notice in excess of $20,000.

"§ 3556. Order of restitution

"The court, in imposing a sentence on a defendant who has been found guilty of an offense under this title, or an offense under section 902 (h), (i), (j), or (n) of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant make restitution to any victim of the offense in accordance with the provisions of sections 3663 and 3664.

"§ 3557. Review of a sentence

"The review of a sentence imposed pursuant to section 3551 is governed by the provisions of section 3742.

"§ 3558. Implementation of a sentence

"The implementation of a sentence imposed pursuant to section 3551 is governed by the provisions of chapter 229.

"§ 3559. Sentencing classification of offenses

"(a) CLASSIFICATION.—An offense that is not specifically classified by a letter grade in the section defining it, is classified—

"(1) if the maximum term of imprisonment authorized is—

"(A) life imprisonment, or if the maximum penalty is death, as a Class A felony;

"(B) twenty years or more, as a Class B felony;

"(C) less than twenty years but ten or more years, as a Class C felony;

"(D) less than ten years but five or more years, as a Class D felony;

"(E) less than five years but more than one year, as a Class E felony;

"(F) one year or less but more than six months, as a Class A misdemeanor;

"(G) six months or less but more than thirty days, as a Class B misdemeanor;

"(H) thirty days or less but more than five days, as a Class C misdemeanor; or

"(I) five days or less, or if no imprisonment is authorized, as an infraction.

"(b) EFFECT OF CLASSIFICATION.—An offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation except that:

"(1) the maximum fine that may be imposed is the fine authorized by the statute describing the offense, or by this chapter, whichever is the greater; and

"(2) the maximum term of imprisonment is the term authorized by the statute describing the offense.

"SUBCHAPTER B—PROBATION

"Sec.
"3561. Sentence of probation.
"3562. Imposition of a sentence of probation.
"3563. Conditions of probation.
"3564. Running of a term of probation.
"3565. Revocation of probation.
"3566. Implementation of a sentence of probation.

"SUBCHAPTER B—PROBATION

"§ 3561. Sentence of probation

"(a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—

"(1) the offense is a Class A or Class B felony;

"(2) the offense is an offense for which probation has been expressly precluded; or

"(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense.

"(b) AUTHORIZED TERMS.—The authorized terms of probation are—

"(1) for a felony, not less than one nor more than five years;

"(2) for a misdemeanor, not more than five years; and

"(3) for an infraction, not more than one year.

"§ 3562. Imposition of a sentence of probation

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF PROBATION.—The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.

"(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence of probation can subsequently be—

"(1) modified or revoked pursuant to the provisions of section 3564 or 3565;

"(2) corrected pursuant to the provisions of rule 35 and section 3742; or

"(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

"§ 3563. Conditions of probation

"(a) MANDATORY CONDITIONS.—The court shall provide, as an explicit condition of a sentence of probation—

"(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation; and

"(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13).

"(b) DISCRETIONARY CONDITIONS.—The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553 (a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—

"(1) support his dependents and meet other family responsibilities;

"(2) pay a fine imposed pursuant to the provisions of subchapter C;

"(3) make restitution to a victim of the offense pursuant to the provisions of section 3556;

"(4) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555;

"(5) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;

"(6) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;

"(7) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;

"(8) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

"(9) refrain from possessing a firearm, destructive device, or other dangerous weapon;

"(10) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;

"(11) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense in section 3581(b), during the first year of the term of probation;

"(12) reside at, or participate in the program of, a community corrections facility for all or part of the term of probation;

"(13) work in community service as directed by the court;

"(14) reside in a specified place or area, or refrain from residing in a specified place or area;

"(15) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;

"(16) report to a probation officer as directed by the court or the probation officer;

"(17) permit a probation officer to visit him at his home or elsewhere as specified by the court;

"(18) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;

"(19) notify the probation officer promptly if arrested or questioned by a law enforcement officer; or

"(20) satisfy such other conditions as the court may impose.

"(c) MODIFICATIONS OF CONDITIONS.—The court may, after a hearing, modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the conditions of probation.

"(d) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

"§ 3564. Running of a term of probation

"(a) COMMENCEMENT.—A term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court.

"(b) CONCURRENCE WITH OTHER SENTENCES.—Multiple terms of probation, whether imposed at the same time or at different times, run concurrently with each other. A term of probation runs concurrently with any Federal, State, or local term of probation, or supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation, except that it does not run during any period in which the defendant is imprisoned for a period of at least 30 consecutive days in connection with a conviction for a Federal, State, or local crime.

"(c) EARLY TERMINATION.—The court, after considering the factors set forth in section 3553(a) to the extent that they are applicable, may terminate a term of probation previously ordered and discharge the defendant at any time in the case of a misdemeanor or an infraction or at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.

"(d) EXTENSION.—The court may, after a hearing, extend a term of probation, if less than the maximum authorized term was previously imposed, at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the term of probation.

"(e) SUBJECT TO REVOCATION.— A sentence of probation remains conditional and subject to revocation until its expiration or termination.

"§ 3565. Revocation of probation

"(a) CONTINUATION OR REVOCATION.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable—

"(1) continue him on probation, with or without extending the term of modifying or enlarging the conditions; or

"(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

"(b) DELAYED REVOCATION.—The power of the court to revoke a sentence of probation for violation of a condition of probation, and to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

"§ 3566. Implementation of a sentence of probation

"The implementation of a sentence of probation is governed by the provisions of subchapter A of chapter 229.

"SUBCHAPTER C—FINES

"Sec.
"3571. Sentence of fine.
"3572. Imposition of a sentence of fine.
"3573. Modification or remission of fine.
"3574. Implementation of a sentence of fine.

"SUBCHAPTER C—FINES

"§ 3571. Sentence of fine

"(a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to pay a fine.

"(b) AUTHORIZED FINES.—Except as otherwise provided in this chapter, the authorized fines are—

"(1) if the defendant is an individual—

"(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $250,000;

"(B) for any other misdemeanor, not more than $25,000; and

"(C) for an infraction, not more than $1,000; and

"(2) if the defendant is an organization—

"(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $500,000;

"(B) for any other misdemeanor, not more than $100,000; and

"(C) for an infraction, not more than $10,000.

"§ 3572. Imposition of a sentence of fine

"(a) FACTORS TO BE CONSIDERED IN IMPOSING FINE.—The court, in determining whether to impose a fine, and, if a fine is to be imposed, in determining the amount of the fine, the time for payment, and the method of payment, shall consider—

"(1) the factors set forth in section 3553(a), to the extent they are applicable, including, with regard to the characteristics of the defendant under section 3553(a), the ability of the defendant to pay the fine in view of the defendant's income, earning capacity, and financial resources and, if the defendant is an organization, the size of the organization;

"(2) the nature of the burden that payment of the fine will impose on the defendant, and on any person who is financially dependent upon the defendant;

"(3) any restitution or reparation made by the defendant to the victim of the offense, and any obligation imposed upon the defendant to make such restitution or reparation to the victim of the offense;

"(4) if the defendant is an organization, any measure taken by the organization to discipline its employees or agents responsible for the offense or to insure against a recurrence of such an offense; and

"(5) any other pertinent equitable consideration.

"(b) LIMIT ON AGGREGATE OF MULTIPLE FINES.—Except as otherwise expressly provided, the aggregate of fines that a court may impose on a defendant at the same time for different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage, is twice the amount imposable for the most serious offense.

"(c) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

"(1) modified or remitted pursuant to the provisions of section 3573;

"(2) corrected pursuant to the provisions of rule 35 and section 3742; or

"(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

"(d) TIME AND METHOD OF PAYMENT.—At the time a defendant is sentenced to pay a fine, the court may provide for the payment to be made within a specified period of time or in specified installments. If no such provision is made a part of the sentence, payment is due immediately.

"(e) Alternative Sentence Precluded.—At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be served in the event that the fine is not paid.

"(f) Individual Responsibility for Payment.—If a fine is imposed on an organization, it is the duty of each individual authorized to make disbursement of the assets of the organization to pay the fine from assets of the organization. If a fine is imposed on an agent or shareholder of an organization, the fine shall not be paid, directly or indirectly, out of the assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

"§ 3573. Modification or remission of fine

"(a) Petition for Modification or Remission.—A defendant who has been sentenced to pay a fine, and who—

"(1) has paid part but not all thereof, and concerning whom the circumstances no longer exist that warranted the imposition of the fine in the amount imposed or payment by the time or method specified, may petition the court for—

"(A) an extension of the time for payment;

"(B) a modification in the method of payment; or

"(C) a remission of all or part of the unpaid portion; or

"(2) has thereafter voluntarily made restitution or reparation to the victim of the offense, may petition the court for a remission of the unpaid portion of the fine in an amount not exceeding the amount of such restitution or reparation.

"(b) Order of Modification or Remission.—If, after the filing of a petition as provided in subsection (a), the court finds that the circumstances warrant relief, the court may enter an appropriate order.

"§ 3574. Implementation of a sentence of fine

"The implementation of a sentence to pay a fine is governed by the provisions of subchapter B of chapter 229.

"SUBCHAPTER D—IMPRISONMENT

"Sec.

"3581. Sentence of imprisonment.
"3582. Imposition of a sentence of imprisonment.
"3583. Inclusion of a term of supervised release after imprisonment.
"3584. Multiple sentences of imprisonment.
"3585. Calculation of a term of imprisonment.
"3586. Implementation of a sentence of imprisonment.

"SUBCHAPTER D—IMPRISONMENT

"§ 3581. Sentence of imprisonment

"(a) In General.—A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment.

"(b) Authorized Terms.—The authorized terms of imprisonment are—

"(1) for a Class A felony, the duration of the defendant's life or any period of time;

"(2) for a Class B felony, not more than twenty-five years;

"(3) for a Class C felony, not more than twelve years;

"(4) for a Class D felony, not more than six years;

"(5) for a Class E felony, not more than three years;

"(6) for a Class A misdemeanor, not more than one year;

"(7) for a Class B misdemeanor, not more than six months;

"(8) for a Class C misdemeanor, not more than thirty days; and

"(9) for an infraction, not more than five days.

"§ 3582. Imposition of a sentence of imprisonment

"(a) Factors To Be Considered in Imposing a Term of Imprisonment.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

"(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

"(1) modified pursuant to the provisions of subsection (c);

"(2) corrected pursuant to the provisions of rule 35 and section 3742; or

"(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

"(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

"(1) in any case—

"(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

"(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

"(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(n), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

"(d) INCLUSION OF AN ORDER TO LIMIT CRIMINAL ASSOCIATION OF ORGANIZED CRIME AND DRUG OFFENDERS.—The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

"§ 3583. Inclusion of a term of supervised release after imprisonment

"(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.

"(b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—The authorized terms of supervised release are—

"(1) for a Class A or Class B felony, not more than three years;

"(2) for a Class C or Class D felony, not more than two years; and

"(3) for a Class E felony, or for a misdemeanor, not more than one year.

"(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

"(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision. The court may order, as a further condition of supervised release, to the extent that such condition—

"(1) is reasonably related to the factors set forth in section 3553 (a)(1), (a)(2)(B), and (a)(2)(D);

"(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553 (a)(2)(B) and (a)(2)(D); and

"(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563 (b)(1) through (b)(10) and (b)(12) through (b)(19), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

"(e) Modification of Term or Conditions.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6)—

"(1) terminate a term of supervised release previously ordered and discharge the person released at any time after the expiration of one year of supervised release, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;

"(2) after a hearing, extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions applicable to the initial setting of the term and conditions of post-release supervision; or

"(3) treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of this title.

"(f) Written Statement of Conditions.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

"§ 3584. Multiple sentences of imprisonment

"(a) Imposition of Concurrent or Consecutive Terms.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

"(b) Factors To Be Considered in Imposing Concurrent or Consecutive Terms.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

"(c) Treatment of Multiple Sentence as an Aggregate.—Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

"§ 3585. Calculation of a term of imprisonment

"(a) Commencement of Sentence.—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

"(b) Credit for Prior Custody.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

"(1) as a result of the offense for which the sentence was imposed; or

"(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

"§ 3586. Implementation of a sentence of imprisonment

"The implementation of a sentence of imprisonment is governed by the provisions of subchapter C of chapter 229 and, if the sentence includes a term of supervised release, by the provisions of subchapter A of chapter 229.

"CHAPTER 229—POSTSENTENCE ADMINISTRATION

"Subchapter

"A. Probation 3601
"B. Fines 3611
"C. Imprisonment 3621

"SUBCHAPTER A—PROBATION

"Sec.
"3601. Supervision of probation.
"3602. Appointment of probation officers.
"3603. Duties of probation officers.
"3604. Transportation of a probationer.
"3605. Transfer of jurisdiction over a probationer.
"3606. Arrest and return of a probationer.
"3607. Special probation and expungement procedures for drug possessor.

"SUBCHAPTER A—PROBATION

"§ 3601. Supervision of probation

"A person who has been sentenced to probation pursuant to the provisions of subchapter B of chapter 227, or placed on probation pursuant to the provisions of chapter 403, or placed on supervised release pursuant to the provisions of section 3583, shall, during the term imposed, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court.

"§ 3602. Appointment of probation officers

"(a) APPOINTMENT.—A district court of the United States shall appoint qualified persons to serve, with or without compensation, as probation officers within the jurisdiction and under the direction of the court making the appointment. The court may, for cause, remove a probation officer appointed to serve with compensation, and may, in its discretion, remove a probation officer appointed to serve without compensation.

"(b) RECORD OF APPOINTMENT.—The order of appointment shall be entered on the records of the court, a copy of the order shall be delivered to the officer appointed, and a copy shall be sent to the Director of the Administrative Office of the United States Courts.

"(c) CHIEF PROBATION OFFICER.—If the court appoints more than one probation officer, one may be designated by the court as chief probation officer and shall direct the work of all probation officers serving in the judicial district.

"§ 3603. Duties of probation officers

"A probation officer shall—

"(a) instruct a probationer or a person on supervised release, who is under his supervision, as to the conditions specified by the sentencing court, and provide him with a written statement clearly setting forth all such conditions;

"(b) keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of a probationer or a person on supervised release, who is under his supervision, and report his conduct and condition to the sentencing court;

"(c) use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition;

"(d) be responsible for the supervision of any probationer or a person on supervised release who is known to be within the judicial district;

"(e) keep a record of his work, and make such reports to the Director of the Administrative Office of the United States Courts as the Director may require;

"(f) upon request of the Attorney General or his designee, supervise and furnish information about a person within the custody of the Attorney General while on work release, furlough, or other authorized release from his regular place of confinement, or while in prerelease custody pursuant to the provisions of section 3624(c); and

"(g) perform any other duty that the court may designate.

"§ 3604. Transportation of a probationer

"A court, after imposing a sentence of probation, may direct a United States marshal to furnish the probationer with—

"(a) transportation to the place to which he is required to proceed as a condition of his probation; and

"(b) money, not to exceed such amount as the Attorney General may prescribe, for subsistence expenses while traveling to his destination.

"§ 3605. Transfer of jurisdiction over a probationer

"A court, after imposing a sentence, may transfer jurisdiction over a probationer or person on supervised release to the district court for any other district to which the person is required to proceed as a condition of his probation or release, or is permitted to proceed, with the concurrence of such court. A later transfer of jurisdiction may be made in the same manner. A court to which jurisdiction is transferred under this section is authorized to exercise all powers over the probationer or releasee that are permitted by this subchapter or subchapter B or D of chapter 227.

"§ 3606. Arrest and return of a probationer

"If there is probable cause to believe that a probationer or a person on supervised release has violated a condition of his probation or release, he may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. A probation officer may make such an arrest wherever the probationer or releasee is found, and may make the arrest without a warrant. The court having supervision of the probationer or releasee, or, if there is no such court, the court last having supervision of the probationer or releasee, may issue a warrant for the arrest of a probationer or releasee for violation of a condition of release, and a probation officer or United States marshal may execute the warrant in the district in which the warrant was issued or in any district in which the probationer or releasee is found.

"§ 3607. Special probation and expungement procedures for drug possessors

"(a) PRE-JUDGMENT PROBATION.—If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)—

"(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

"(2) has not previously been the subject of a disposition under this subsection;

the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565.

"(b) RECORD OF DISPOSITION.—A nonpublic record of a disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition provided in subsection (a) or the expungement provided in subsection (c). A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

"(c) EXPUNGEMENT OF RECORD OF DISPOSITION.—If the case against a person found guilty of an offense under section 404 of the Controlled Substances Act (21 U.S.C. 844) is the subject of a disposition under subsection (a), and the person was less than twenty-one years old at the time of the offense, the court shall enter an expungement order upon the application of such person. The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

"SUBCHAPTER B—FINES

"Sec.
"3611. Payment of a fine.
"3612. Collection of an unpaid fine.
"3613. Lien provisions for satisfaction of an unpaid fine.

"SUBCHAPTER B—FINES

"§ 3611. Payment of a fine

"A person who has been sentenced to pay a fine pursuant to the provisions of subchapter C of chapter 227 shall pay the fine immediately, or by the time and method specified by the sentencing court, to the clerk of the court. The clerk shall forward the payment to the United States Treasury.

"§ 3612. Collection of an unpaid fine

"(a) CERTIFICATION OF IMPOSITION.—If a fine is imposed, the sentencing court shall promptly certify to the Attorney General—

"(1) the name of the person fined;
"(2) his last known address;
"(3) the docket number of the case;
"(4) the amount of the fine imposed;
"(5) the time and method of payment specified by the court;
"(6) the nature of any modification or remission of the fine; and
"(7) the amount of the fine that is due and unpaid.

The court shall thereafter promptly certify to the Attorney General the amount of any subsequent payment that the court may receive with respect to, and the nature of any subsequent remission or modification of, a fine concerning which certification has previously been issued.

"(b) RESPONSIBILITY FOR COLLECTION.—The Attorney General shall be responsible for collection of an unpaid fine concerning which a certification has been issued as provided in subsection (a). An order of restitution, pursuant to section 3556, does not create any right of action against the United States by the person to whom restitution is ordered to be paid.

"§ 3613. Lien provisions for satisfaction of an unpaid fine

"(a) LIEN.—A fine imposed pursuant to the provisions of subchapter C of chapter 227 is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b). On application of the person fined, the Attorney General shall—

"(1) issue a certificate of release, as described in section 6325 of the Internal Revenue Code, of any lien imposed pursuant to this section, upon his acceptance of a bond described in section 6325(a)(2) of the Internal Revenue Code; or

"(2) issue a certificate of discharge, as described in section 6325 of the Internal Revenue Code, of any part of the person's property subject to a lien imposed pursuant to this section, upon his determination that the fair market value of that part of such property remaining subject to and available to satisfy the lien is at least three times the amount of the fine.

"(b) EXPIRATION OF LIEN.—A lien becomes unenforceable and liability to pay a fine expires—

"(1) twenty years after the entry of the judgment; or
"(2) upon the death of the individual fined.

The period set forth in paragraph (1) may be extended, prior to its expiration, by a written agreement between the person fined and the Attorney General. The running of the period set forth in paragraph (1) is suspended during any interval for which the running of the period of limitations for collection of a tax would be suspended pursuant to section 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I) of the Internal Revenue Code of 1954 (26 U.S.C. 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I)), or section 513 of the Act of October 17, 1940, 54 Stat. 1190.

"(c) APPLICATION OF OTHER LIEN PROVISIONS.—The provisions of sections 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805) and of section 513 of the Act of October 17, 1940, 54 Stat. 1190, apply to a fine and to the lien imposed by subsection (a) as if the liability of the person fined were for an internal revenue tax assessment, except to the extent that the application of such statutes is modified by regulations issued by the Attorney General to accord with differences in the nature of the liabilities. For the purposes of this subsection, references in the preceding sections of the Internal Revenue Code of 1954 to 'the Secretary' shall be construed to mean 'the Attorney General,' and references in those sections to 'tax' shall be construed to mean 'fine.'

"(d) EFFECT OF NOTICE OF LIEN.—A notice of the lien imposed by subsection (a) shall be considered a notice of lien for taxes payable to the United States for the purposes of any State or local law providing for the filing of a notice of a tax lien. The registration, recording, docketing, or indexing, in accordance with 28 U.S.C. 1962, of the judgment under which a fine is imposed shall be considered for all purposes as the filing prescribed by section 6323(f)(1)(A) of the Internal Revenue Code of 1954 (26 U.S.C. 6323(f)(1)(A)) and by subsection (c).

"(e) Alternative Enforcement.—Notwithstanding any other provision of this section, a judgment imposing a fine may be enforced by execution against the property of the person fined in like manner as judgments in civil cases, but in no event shall liability for payment of a fine extend beyond the period specified in subsection (b).

"(f) Discharge of Debts Inapplicable.—No discharge of debts pursuant to a bankruptcy proceeding shall render a lien under this section unenforceable or discharge liability to pay a fine.

"SUBCHAPTER C—IMPRISONMENT

"Sec.
"3621. Imprisonment of a convicted person.
"3622. Temporary release of a prisoner.
"3623. Transfer of a prisoner to State authority.
"3624. Release of a prisoner.
"3625. Inapplicability of the Administrative Procedure Act.

"SUBCHAPTER C—IMPRISONMENT

"§ 3621. Imprisonment of a convicted person

"(a) Commitment to Custody of Bureau of Prisons.—A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

"(b) Place of Imprisonment.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

"(1) the resources of the facility contemplated;

"(2) the nature and circumstances of the offense;

"(3) the history and characteristics of the prisoner;

"(4) any statement by the court that imposed the sentence—

"(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

"(B) recommending a type of penal or correctional facility as appropriate; and

"(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another.

"(c) Delivery of Order of Commitment.—When a prisoner, pursuant to a court order, is placed in the custody of a person in charge of a penal or correctional facility, a copy of the order shall be delivered to such person as evidence of this authority to hold the prisoner, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

"(d) Delivery of Prisoner for Court Appearances.—The United States Marshal shall, without charge, bring a prisoner into court or return him to a prison facility on order of a court of the United States or on written request of an attorney for the Government.

"§ 3622. Temporary release of a prisoner

"The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period if such release appears to be consistent with the purpose for which the sentence was imposed and any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2), if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that a prisoner will honor the trust to be imposed in him, by authorizing him, under prescribed conditions, to—

"(a) visit a designated place for a period not to exceed thirty days, and then return to the same or another facility, for the purpose of—

"(1) visiting a relative who is dying;

"(2) attending a funeral of a relative;

"(3) obtaining medical treatment not otherwise available;

"(4) contacting a prospective employer;

"(5) establishing or reestablishing family or community ties; or

"(6) engaging in any other significant activity consistent with the public interest;

"(b) participate in a training or educational program in the community while continuing in official detention at the prison facility; or

"(c) work at paid employment in the community while continuing in official detention at the penal or correctional facility if—

"(1) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the community; and

"(2) the prisoner agrees to pay to the Bureau such costs incident to official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the Treasury to the credit of the appropriation available for such costs at the time such collections are made.

"§ 3623. Transfer of a prisoner to State authority

"The Director of the Bureau of Prisons shall order that a prisoner who has been charged in an indictment or information with, or convicted of, a State felony, be transferred to an official detention facility within such State prior to his release from a Federal prison facility if—

"(1) the transfer has been requested by the Governor or other executive authority of the State;

"(2) the State has presented to the Director a certified copy of the indictment, information, or judgment of conviction; and

"(3) the Director finds that the transfer would be in the public interest.

If more than one request is presented with respect to a prisoner, the Director shall determine which request should receive preference. The expenses of such transfer shall be borne by the State requesting the transfer.

"§ 3624. Release of a prisoner

"(a) DATE OF RELEASE.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of his term of imprisonment, less any time credited toward the service of his sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

"(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.—A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of his life, shall receive credit toward the service of his sentence, beyond the time served, of thirty-six days at the end of each year of his term of imprisonment, beginning after the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time that it is received. Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted. Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

"(c) PRE-RELEASE CUSTODY.—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last ten percent of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

"(d) ALLOTMENT OF CLOTHING, FUNDS, AND TRANSPORTATION.—Upon the release of a prisoner on the expiration of his term of imprisonment, the Bureau of Prisons shall furnish him with—

"(1) suitable clothing;

"(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the

Director determines that the financial position of the offender is such that no sum should be furnished; and

"(3) transportation to the place of his conviction, to his bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

"(e) Supervision After Release.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment. The term runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release, except that it does not run during any period in which the person is imprisoned, other than during limited intervals as a condition of probation or supervised release, in connection with a conviction for a Federal, State, or local crime.

"§ 3625. Inapplicability of the Administrative Procedure Act

"The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter.";

(3) in section 3663 (formerly section 3579):

(A) by amending subsection (g) to read as follows:

"(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation, or modify the term or conditions of a term of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such order. In determining whether to revoke probation, modify the term or conditions of supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay."; and

(B) by amending subsection (h) to read as follows:

"(h) An order of restitution may be enforced by the United States in the manner provided in sections 3812 and 3813 or in the same manner as a judgment in a civil action, and by the victim named in the order to receive the restitution in the same manner as a judgment in a civil action.";

(4) adding the following new section at the end of chapter 232:

"§ 3671. Definitions for sentencing provisions

"As used in chapters 227 and 229—

"(a) 'found guilty' includes acceptance by a court of a plea of guilty or nolo contendere;

"(b) 'commission of an offense' includes the attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense; and

"(c) 'law enforcement officer' means a public servant authorized by law or by a government agency to engage in or supervise the prevention, detection, investigation, or prosecution of an offense."; and

(5) adding the following caption and sectional analysis at the beginning of new chapter 232:

"CHAPTER 232—MISCELLANEOUS SENTENCING PROVISIONS

"Sec.
"3661. Use of information for sentencing.
"3662. Conviction records.
"3663. Order of restitution.
"3664. Procedure for issuing order of restitution.
"3665. Firearms possessed by convicted felons.
"3666. Bribe moneys.
"3667. Liquors and related property; definitions.
"3668. Remission or mitigation of forfeitures under liquor laws; possession pending trial.
"3669. Conveyance carrying liquor.
"3670. Disposition of conveyances seized for violation of the Indian liquor laws.
"3671. Vessels carrying explosives and steerage passengers.
"3672. Duties of Director of Administrative Office of the United States Courts.
"3673. Definitions for sentencing provisions.".

(b) The chapter analysis of Part II of title 18, United States Code, is amended by striking out the items relating to chapters 227, 229, and 231, and inserting in lieu thereof the following:

"227. Sentences	3551
"229. Post-Sentence Administration	3601
"231. Repealed	
"232. Miscellaneous Sentencing Provisions	3661".

Sec. 3. (a) Chapter 235 of title 18, United States Code, is amended by adding the following new section at the end thereof:

"§ 3742. Review of a sentence

"(a) Appeal by a Defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); or

"(3) is greater than the sentence, if any, specified in a plea agreement under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure, and—

"(A) is greater than the sentence specified in the applicable sentencing guideline issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), to the extent that the sentence includes a greater fine or term of imprisonment or term of supervised release than the maximum established in the guideline, or includes a more limited condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the maximum established in the guideline; or

"(B) there is no guideline for any offense under the provision of law that the defendant was convicted of violating.

"(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 23 U.S.C. 994(a); or

"(3) is less than the sentence, if any, specified in a plea agreement under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure, and—

"(A) is less than the sentence specified in the applicable sentencing guideline issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), to the extent that the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guideline, or includes a less limiting condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the minimum established in the guideline; or

"(B) there is no guideline for any offense under the provision of law that the defendant was convicted of violating;

and the Attorney General or the Solicitor General personally approves the filing of the notice of appeal.

"(c) Record on Review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

"(1) that portion of the record in the case that is designated as pertinent by either of the parties;

"(2) the presentence report; and

"(3) the information submitted during the sentencing proceeding.

"(d) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

"(3) is outside the range of the applicable sentencing guideline, and is unreasonable, having regard for—

"(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

"(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c).

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous.

"(c) Decision and Disposition.—If the court of appeals determines that the sentence—

"(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, it shall—

"(A) remand the case for further sentencing proceedings; or

"(B) correct the sentence;

"(2) is outside the range of the applicable sentencing guideline and is unreasonable, it shall state specific reasons for its conclusions and—

"(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and—

"(i) remand the case for imposition of a lesser sentence;

"(ii) remand the case for further sentencing proceedings; or

"(iii) impose a lesser sentence;

"(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and—

"(i) remand the case for imposition of a greater sentence;

"(ii) remand the case for further sentencing proceedings; or

"(iii) impose a greater sentence; or

"(3) was not imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, and is not unreasonable, it shall affirm the sentence.".

(b) The sectional analysis of chapter 235 of title 18, United States Code, is amended by adding the following new item after the item relating to section 3741:

"3742. Review of a sentence.".

Sec. 4. Chapter 403 of title 18, United States Code is amended as follows:

(a) Section 5037 is amended—

(1) by redesignating subsection (c) as subsection (d); and

(2) by striking out subsections (a) and (b) and inserting the following new subsections in lieu thereof:

"(a) If the court finds a juvenile to be a juvenile delinquent, the court shall hold a disposition hearing concerning the appropriate disposition no later than twenty court days after the juvenile delinquency hearing unless the court has ordered further study pursuant to subsection (e). After the disposition hearing, and after considering any pertinent policy statements promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994, the court may suspend the findings of juvenile delinquency, enter an order of restitution pursuant to section 3556, place him on probation, or commit him to official detention. With respect to release or detention pending an appeal or a petition for a writ of certiorari after disposition, the court shall proceed pursuant to the provisions of chapter 207.

"(b) The term for which probation may be ordered for a juvenile found to be a juvenile delinquent may not extend—

"(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between eighteen and twenty-one years old, beyond the lesser of—

"(A) three years; or

"(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult.

The provisions dealing with probation set forth in sections 3563, 3564, and 3565 are applicable to an order placing a juvenile on probation.

"(c) The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend—

"(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term of imprisonment that would be authorized by section 3581(b) if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between eighteen and twenty-one years old—

"(A) who if convicted as an adult would be convicted of a Class A, B, or C felony, beyond five years; or

"(B) in any other case beyond the lesser of—

"(i) three years; or

"(ii) the maximum term of imprisonment that would be authorized by section 3581(b) if the juvenile had been tried and convicted as an adult.".

(b) Section 5041 is repealed.

(c) Section 5042 is amended by—

(1) striking out "parole or" each place it appears in the caption and text; and

(2) striking out "parolee or".

(d) The sectional analysis is amended by striking out the items relating to sections 5041 and 5042 and inserting in lieu thereof the following:

"5041. Repealed.
"5042. Revocation of Probation.".

SEC. 5. The Federal Rules of Criminal Procedure are amended as follows:

(a) Rule 32 is amended—

(1) by deleting subdivision (a)(1) and inserting in lieu thereof the following:

"(1) IMPOSITION OF SENTENCE.—Sentence shall be imposed without unnecessary delay, but the court may, upon a motion that is jointly filed by the defendant and by the attorney for the Government and that asserts a factor important to the sentencing determination is not capable of being resolved at that time, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also—

"(A) determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

"(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; and

"(C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of the sentence.

The attorney for the Government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.";

(2) in subdivision (a)(2), by adding ", including any right to appeal the sentence," after "right to appeal" in the first sentence;

(3) in subdivision (a)(2), by adding ", except that the court shall advise the defendant of any right to appeal his sentence" after "nolo contendere" in the second sentence;

(4) by amending the first sentence of subdivision (c)(1) to read as follows:

"A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record.";

(5) by amending subdivision (c)(2) to read as follows:

"(2) REPORT.—The report of the presentence investigation shall contain—

"(A) information about the history and characteristics of the defendant, including his prior criminal record, if any, his financial condition, and any circumstances affecting his behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

"(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances;

"(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

"(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

"(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

"(F) such other information as may be required by the court.";

(6) in subdivision (c)(3)(A), by deleting "exclusive of any recommendations as to sentence" and inserting in lieu thereof ", including the information required by subdivision (c)(2) but not including any final recommendation as to sentence,";

(7) in subdivision (c)(3)(D), delete "or the Parole Commission";

(8) in subdivision (c)(3)(F), delete "or the Parole Commission pursuant to 18 U.S.C. §§ 4205(c), 4252, 5010(e), or 5037(c)" and substitute "pursuant to 18 U.S.C. § 3552(b)";

(9) by deleting "or imposition of sentence is suspended;" in subdivision (d) and inserting in lieu thereof a comma; and

(10) by deleting "or disposition is had under 18 U.S.C. § 4205(c)," in subsection (d).

(b) Rule 35 is amended to read as follows:

"Rule 35. Correction of Sentence

"(a) Correction of a Sentence on Remand.—The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court—

"(1) for imposition of a sentence in accord with the findings of the court of appeals; or

"(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

"(b) Correction of Sentence for Changed Circumstances.—The court, on motion of the government, may within one year after the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).".

(c) Rule 38 is amended—

(1) by amending the caption to read: "Stay of Execution" and deleting "(a) Stay of Execution.";

(2) by deleting subdivisions (b) and (c);

(3) by redesignating subdivisions (a)(1) through (a)(4) as subdivisions (a) through (d), respectively;

(4) in subdivision (a), by adding "from the conviction or sentence" after "is taken";

(5) in the first sentence of subdivision (b), by adding "from the conviction or sentence" after "is taken";

(6) by amending subdivision (d) to read as follows:

"(d) Probation.—A sentence of probation may be stayed if an appeal from the conviction or sentence is taken. If the sentence is stayed, the court shall fix the terms of the stay."; and

(7) by adding new subdivisions (e) and (f) as follows:

"(e) Criminal Forfeiture, Notice to Victims, and Restitution.—A sanction imposed as part of the sentence pursuant to 18 U.S.C. 3554, 3555, or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

"(f) Disabilities.—A civil or employment disability arising under a Federal statute by reason of the defendant's conviction or sentence, may, if an appeal is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may enter a restraining order or an injunction, or take any other action that may be reasonably necessary to protect the interest represented by the disability pending disposition of the appeal.".

(d) Rule 40 is amended by deleting "3653" in subdivision (d)(1) and inserting in lieu thereof "3605".

(e) Rule 54 is amended by amending the definition of "Petty offense" in subdivision (c) to read as follows: " 'Petty offense' means a class B or C misdemeanor or an infraction.".

(f) The Table of Rules that precedes Rule 1 is amended as follows:

(1) The item relating to Rule 35 is amended by deleting the words "or Reduction".

(2) The item relating to Rule 38 is amended to read as follows:

"38. Stay of Execution.
"(a) Death.
"(b) Imprisonment.
"(c) Fine.
"(d) Probation.
"(e) Criminal forfeiture, notice to victims, and restitution.
"(f) Disabilities.".

SEC. 6. (a) The Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates are amended by adding the following new rule at the end thereof:

"Rule 9. Definition

"As used in these rules, 'petty offense' means a Class B or C misdemeanor or an infraction.".

(b) The Table of Rules that precedes Rule 1 is amended by adding at the end thereof the following new item:

"12. Definition".

SEC. 7. (a) Title 28 of the United States Code is amended by adding the following new chapter after chapter 57:

CHAPTER 58—UNITED STATES SENTENCING COMMISSION

"Sec.
"991. United States Sentencing Commission; establishment and purposes.
"992. Terms of office; compensation.
"993. Powers and duties of Chairman.
"994. Duties of the Commission.
"995. Powers of the Commission.
"996. Director and staff.
"997. Annual report.
"998. Definitions.

"§ 991. United States Sentencing Commission; establishment and purposes

"(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chairman. At least two of the members shall be Federal judges in regular active service selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party. The Attorney General, or his designee, shall be an ex officio, nonvoting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

"(b) The purposes of the United States Sentencing Commission are to—

"(1) establish sentencing policies and practices for the Federal criminal justice system that—

"(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

"(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

"(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

"(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

"§ 992. Terms of office; compensation

"(a) The voting members of the United States Sentencing Commission shall be appointed for six-year terms, except that the initial terms of the first members of the Commission shall be staggered so that—

"(1) two members, including the chairman, serve terms of six years;

"(2) three members serve terms of four years; and

"(3) two members serve terms of two years.

"(b) No voting member may serve more than two full terms. A voting member appointed to fill a vacancy that occurs before the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term.

"(c) The Chairman of the Commission shall hold a full-time position and shall be compensated during the term of office at the annual rate at which judges of the United States courts of appeals are compensated. The voting members of the Commission, other than the Chairman, shall hold full-time positions until the end of the first six years after the sentencing guidelines go into effect pursuant to section 225(a)(1)(B)(ii) of the Sentencing Reform Act of 1983, and shall be compensated at the annual rate at which judges of the United States courts of appeals are compensated. Thereafter, the voting members of the Commission, other than the Chairman, shall hold part-time positions and shall be paid at the daily rate at which judges of the United States courts of appeals are compensated. A Federal judge may serve as a member of the Commission without resigning his appointment as a Federal judge.

"§ 993. Powers and duties of Chairman

"The Chairman shall—

"(a) call and preside at meetings of the Commission, which shall be held for at least two weeks in each quarter after the members of the Commission hold part-time positions; and

"(b) direct—

"(1) the preparation of requests for appropriations for the Commission; and

"(2) the use of funds made available to the Commission.

"§ 994. Duties of the Commission

"(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System—

"(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

"(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

"(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

"(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term; and

"(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively;

"(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

"(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

"(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

"(C) the sentence modification provisions set forth in sections 3563(c), 3573, and 3582(c) of title 18;

"(D) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

"(E) the temporary release provisions set forth in section 3622 of title 18, and the pre-release custody provisions set forth in section 3624(c) of title 18; and

"(3) guidelines or general policy statements regarding the appropriate use of the probation revocation provisions set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of probation or supervised release set forth in sections 3563(c), 3564(d), and 3583(e) of title 18.

"(b) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code. If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than 25 per centum.

"(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

"(1) the grade of the offense;

"(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

"(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

"(4) the community view of the gravity of the offense;

"(5) the public concern generated by the offense;

"(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

"(7) the current incidence of the offense in the community and in the nation as a whole.

"(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

"(1) age;

"(2) education;

"(3) vocational skills;

"(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

"(5) physical condition, including drug dependence;

"(6) previous employment record;

"(7) family ties and responsibilities;

"(8) community ties;

"(9) role in the offense;

"(10) criminal history; and

"(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

"(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

"(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

"(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter.

"(h) The Commission shall assure that the guidelines will specify a sentence to a term of imprisonment at or near the maximum term authorized by section 3581(b) of title 18, United States Code, for categories of defendants in which the defendant is eighteen years old or older and—

"(1) has been convicted of a felony that is—

"(A) a crime of violence; or

"(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); and

"(2) has previously been convicted of two or more prior felonies, each of which is—

"(A) a crime of violence; or

"(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a).

"(i) The Commission shall assure that the guidelines will specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

"(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

"(2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income;

"(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

"(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

"(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

"(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

"(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

"(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

"(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

"(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

"(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3150 (penalties for failure to appear) of title 18; and

"(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

"(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

"(n) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

"(o) The Commission, at or after the beginning of a regular session of Congress but not later than the first day of May, shall report to the Congress any amendments of the guidelines promulgated pursuant to subsection (a)(1), and a report of the reasons therefor, and the amended guidelines shall take effect one hundred and eighty days after the Commission reports them, except to the extent the effective date is enlarged or the guidelines are disapproved or modified by Act of Congress.

"(p) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

"(1) modernization of existing facilities;

"(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

"(3) use of existing Federal facilities, such as those currently within military jurisdiction.

"(q) The Commission, within three years of the date of enactment of the Sentencing Reform Act of 1983, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

"(r) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

"(1) the community view of the gravity of the offense;

"(2) the public concern generated by the offense; and

"(3) the deterrent effect particular sentences may have on the commission of the offense by others.

Within one hundred and eighty days of the filing of such petition the Commission shall provide written notice to the defendant whether or not it has approved the petition. If the petition is disapproved the written notice shall contain the reasons for such disapproval. The Commission shall submit to the Congress at least annually an analysis of such written notices.

"(s) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

"(t) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify by what amount the sentences of prisoners serving terms of imprisonment that are outside the applicable guideline ranges for the offense may be reduced.

"(u) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

"(v) The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed a written report of the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

"(w) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

"§ 995. Powers of the Commission

"(a) The Commission, by vote of a majority of the members present and voting, shall have the power to—

"(1) establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out the purposes of this chapter;

"(2) appoint and fix the salary and duties of the Staff Director of the Sentencing Commission, who shall serve at the discretion of the Commission and who shall be compensated at a rate not to exceed the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332);

"(3) deny, revise, or ratify any request for regular, supplemental, or deficiency appropriations prior to any submission of such request to the Office of Management and Budget by the Chairman;

"(4) procure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code;

"(5) utilize, with their consent, the services, equipment, personnel, information, and facilities of other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor;

"(6) without regard to 31 U.S.C. 3324, enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or non-profit organization;

"(7) accept and employ, in carrying out the provisions of this title, voluntary and uncompensated services, notwithstanding the provisions of 31 U.S.C. 1342, however, individuals providing such services shall not be considered Federal employees except for purposes of chapter 81 of title 5, United States Code, with respect to job-incurred disability and title 28, United States Code, with respect to tort claims;

"(8) request such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law;

"(9) monitor the performance of probation officers with regard to sentencing recommendations, including application of the Sentencing Commission guidelines and policy statements;

"(10) issue instructions to probation officers concerning the application of Commission guidelines and policy statements;

"(11) arrange with the head of any other Federal agency for the performance by such agency of any function of the Commission, with or without reimbursement;

"(12) establish a research and development program within the Commission for the purpose of—

"(A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices; and

"(B) assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices;

"(13) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;

"(14) publish data concerning the sentencing process;

"(15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code;

"(16) collect systematically and disseminate information regarding effectiveness of sentences imposed;

"(17) devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field;

"(18) devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process;

"(19) study the feasibility of developing guidelines for the disposition of juvenile delinquents;

"(20) make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy;

"(21) hold hearings and call witnesses that might assist the Commission in the exercise of its powers or duties; and

"(22) perform such other functions as are required to permit Federal courts to meet their responsibilities under section 3553(a) of title 18, United States Code, and to permit others involved in the Federal criminal justice system to meet their related responsibilities.

"(b) The Commission shall have such other powers and duties and shall perform such other functions as may be necessary to carry out the purposes of this chapter, and may delegate to any member or designated person such powers as may be appropriate other than the power to establish general policy statements and guidelines pursuant to section 994(a) (1) and (2), the issuance of general policies and promulgation of rules and regulations pursuant to subsection (a)(1) of this section, and the decisions as to the factors to be considered in establishment of categories of offenses and offenders pursuant to section 994(b). The Commission shall, with respect to its activities under subsections (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (a)(15), (a)(16), (a)(17), and (a)(18), to the extent practicable, utilize existing resources of the Administrative Office of the United States Courts and the Federal Judicial Center for the purpose of avoiding unnecessary duplication.

"(c) Upon the request of the Commission, each Federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions.

"(d) A simple majority of the membership then serving shall constitute a quorum for the conduct of business. Other than for the promulgation of guidelines and policy statements pursuant to section 994, the Commission may exercise its powers and fulfill its duties by the vote of a simple majority of the members present.

"(e) Except as otherwise provided by law, the Commission shall maintain and make available for public inspection a record of the final vote of each member on any action taken by it.

"§ 996. Director and staff

"(a) The Staff Director shall supervise the activities of persons employed by the Commission and perform other duties assigned to him by the Commission.

"(b) The Staff Director shall, subject to the approval of the Commission, appoint such officers and employees as are necessary in the execution of the functions of the Commission. The officers and employees of the Commission shall be exempt from the provisions of part III of title 5, United States Code, except the following chapters: 81 (Compensation for Work Injuries), 83 (Retirement), 85 (Unemployment Compensation), 87 (Life Insurance), 89 (Health Insurance), and 91 (Conflicts of Interest).

"§ 997. Annual report

"The Commission shall report annually to the Judicial Conference of the United States, the Congress, and the President of the United States on the activities of the Commission.

"§ 998. Definitions

"As used in this chapter—

"(a) 'Commission' means the United States Sentencing Commission;

"(b) 'Commissioner' means a member of the United States Sentencing Commission;

"(c) 'guidelines' means the guidelines promulgated by the Commission pursuant to section 994(a) of this title; and

"(d) 'rules and regulations' means rules and regulations promulgated by the Commission pursuant to section 995 of this title.".

(b) The chapter analysis of part III of title 28, United States Code, is amended by adding after the item relating to chapter 57 the following new item:

"58. United States Sentencing Commission .... 991".

REPEALERS

SEC. 8. (a) The following provisions of title 18, United States Code, are repealed:

(1) section 1;
(2) section 3012;
(3) sections 4082(a), 4082(b), 4082(c), 4082(e), 4084, and 4085;
(4) chapter 309;
(5) chapter 311;
(6) chapter 314;
(7) sections 4281, 4283, and 4284; and
(8) chapter 402.

(b) The item relating to section 1 in the sectional analysis of chapter 1 of title 18, United States Code, is amended to read:

"1. Repealed.".

(c) The item relating to section 3012 in the sectional analysis of chapter 201 of title 18, United States Code, is amended to read:

"3012. Repealed.".

(d) The chapter analysis of Part III of title 18, United States Code, is amended by amending the items relating to—

(1) chapters 309 and 311 to read as follows:

"309. Repealed ....
"311. Repealed .... ";

and

(2) chapter 314 to read as follows:

"314. Repealed .... ".

(e) The items relating to sections 4084 and 4085 in the sectional analysis of chapter 305 of title 18, United States Code, are amended to read as follows:

"4084. Repealed.
"4085. Repealed.".

(f) The sectional analysis of chapter 315 of title 18, United States Code, is amended by amending the items relating to—

(1) section 4281 to read:

"4281. Repealed."; and

(2) sections 4283 and 4284 to read as follows:

"4283. Repealed.
"4284. Repealed.".

(g) The item relating to chapter 402 in the chapter analysis of Part IV of title 18, United States Code, is amended to read as follows:

"402. Repealed .... ".

SEC. 9. (a) Sections 404(b) and 409 of the Controlled Substances Act (21 U.S.C. 844(b) and 849) are repealed.

(b) Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by deleting the designation "(a)" at the beginning of the subsection.

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 10. The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended as follows:

(a) The second sentence of section 212(a)(9) (8 U.S.C. 1182(a)(9)) is amended to read: "An alien who would be excludable because of the conviction of an offense for which the sentence actually imposed did not exceed a term of imprisonment in excess of six months, or who would be excludable as one who admits the commission of an offense for which a sentence not to exceed one year's imprisonment might have been imposed on him, may be granted a visa and admitted to the United States if otherwise admissible: *Provided*, That the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense.".

(b) Section 242(h) (8 U.S.C. 1252(h)) is amended by adding "supervised release," after "parole,".

SEC. 11. Section 4 of the Act of September 28, 1962 (16 U.S.C. 460k-3) is amended by deleting "petty offense (18 U.S.C. 1)" and substituting "misdemeanor".

SEC. 12. Section 9 of the Act of October 8, 1964 (16 U.S.C. 460n-8) is amended—

(a) in the first paragraph, by deleting "commissioner" each place it appears and substituting "magistrate"; and

(b) in the second paragraph, by amending the first sentence to read: "The functions of the magistrate shall include the trial and sentencing of persons charged with the commission of misdemeanors and infractions as defined in section 3581 of title 18, United States Code.".

SEC. 13. Title 18 of the United States Code is amended as follows:

(a) Section 924(a) is amended by deleting ", and shall become eligible for parole as the Board of Parole shall determine".

(b) Section 1161 is amended by deleting "3618" and substituting "3667".

(c) Section 1761(a) is amended by adding ", supervised release," after "parole".

(d) Section 1963 is amended—

(1) in subsection (a), by deleting "(1) any interest he has acquired" and all through the end of the subsection and substituting "the property described in section 3554 in accord with the provisions of that section."; and

(2) by repealing subsections (b) and (c).

(e) Section 2114 is amended by adding "not more than" after "imprisoned".

(f) Section 3006A is amended—

(1) in subsections (a)(1) and (b), by deleting "misdemeanor (other than a petty offense as defined in section 1 of this title)" each place it appears and substituting "Class A misdemeanor"; and

(2) in subsections (a)(3) and (g), deleting "subject to revocation of parole," each place it appears.

(g) Section 3156(b)(2) is amended by deleting "petty offense as defined in section 1(3) of this title" and substituting "Class B or C misdemeanor or an infraction".

(h) Section 3172(2) is amended by deleting "petty offense as defined in section 1(3) of this title" and substituting "Class B or C misdemeanor or an infraction".

(i) Section 3401 is amended—

(1) by repealing subsection (g); and

(2) in subsection (h), by deleting "petty offense case" and substituting "Class B or C misdemeanor case, or infraction case,".

(j) Section 3670 (formerly section 3619) is amended by deleting "3617" and "3618" and substituting "3666" and "3667", respectively.

(k) Section 4004 is amended by deleting "record clerks, and parole officers" and substituting "and record clerks".

(l) Chapter 306 is amended as follows:

(1) Section 4101 is amended—

(A) in subsection (f), by adding ", including a term of supervised release pursuant to section 3583" after "supervision"; and

(B) in subsection (g), by deleting "to a penalty of imprisonment the execution of which is suspended and" and substituting "under which", and by deleting "the suspended" and substituting "a".

(2) Section 4105(c) is amended—

(A) in paragraph (1), by deleting "for good time" the second place it appears and substituting "toward service of sentence for satisfactory behavior";

(B) in paragraphs (1) and (2), by deleting "section 4161" and substituting "section 3624(b)";

(C) in paragraph (1), by deleting "section 4164" and substituting "section 3624(a)";

(D) by repealing paragraph (3); and

(E) by amending paragraph (4) to read as follows:

"(4) Credit toward service of sentence may be withheld as provided in section 3624(b) of this title.".

(3) Section 4106 is amended—

(A) in subsection (a), by deleting "Parole Commission" and substituting "Probation System";

(B) by amending subsection (b) to read as follows:

"(b) An offender transferred to the United States to serve a sentence of imprisonment shall be released pursuant to section 3624(a) of this title after serving the period of time specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994(a)(1). He shall be released to serve a term of supervised release for any term specified in the applicable guideline. The provisions of section 3742 of this title apply to a sentence to a term of imprisonment under this subsection, and the United States court of appeals for the district in which the offender is imprisoned after transfer to the United States has jurisdiction to review the period of imprisonment as though it had been imposed by the United States district court."; and

(C) by repealing subsection (c).

(4) Section 4108(a) is amended by adding ", including any term of imprisonment or term of supervised release specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994(a)(1)," after "consequences thereof".

(m) Section 4321 is amended by deleting "parole or".

(n) Section 4351(b) is amended by deleting "Parole Board" and substituting "Sentencing Commission".

(o) Section 5002 is amended by deleting "Board of Parole, the Chairman of the Youth Division," and substituting "United States Sentencing Commission,".

Sec. 14. The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended as follows:

(a) Section 401 (21 U.S.C. 841) is amended—

(1) in subsection (b)(1)(A), by deleting the last sentence;

(2) in subsection (b)(1)(B), by deleting the last sentence;

(3) in subsection (b)(2), by deleting the last sentence;

(4) in subsection (b)(4), by deleting "subsections (a) and (b) of", and by adding "and section 3607 of title 18, United States Code" after "404";

(5) in subsection (b)(5), by deleting the last sentence; and

(6) by repealing subsection (c).

(b) Section 405 (21 U.S.C. 845) is amended—

(1) in subsection (a), by deleting "(1)" the second place it appears, and by deleting ", and (2) at least twice any special parole term authorized by section 401(b), for a first offense involving the same controlled substance and schedule"; and

(2) in subsection (b), by deleting "(1)" the second place it appears, and by deleting ", and (2) at least three times any special parole term authorized by section 401(b), for a second or subsequent offense involving the same controlled substance and schedule".

(c) Section 408(c) (21 U.S.C. 848(c)) is amended by deleting "and section 4202 of title 18 of the United States Code".

Sec. 15. The Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.) is amended as follows:

(a) Section 1010 (21 U.S.C. 960) is amended—

(1) in subsection (b)(1), by deleting the last sentence;

(2) in subsection (b)(2), by deleting the last sentence; and

(3) by repealing subsection (c).

(b) Section 1012(a) (21 U.S.C. 962(a)) is amended by deleting the last sentence.

Sec. 16. Section 114(b) of title 23, United States Code, is amended by adding ", supervised release," after "parole".

Sec. 17. Section 5871 of the Internal Revenue Code of 1954 (26 U.S.C. 5871) is amended by deleting ", and shall become eligible for parole as the Board of Parole shall determine".

Sec. 18. Title 28 of the United States Code is amended as follows:

(a) Section 509 is amended—

(1) in paragraph (3), by deleting "; and" and substituting a period; and

(2) by repealing paragraph (4).

(b) Section 591(a) is amended by deleting "petty offense" and substituting "Class B or C misdemeanor or an infraction".

(c) Section 2901 is amended—

(1) in subsection (e), by deleting "section 1" and substituting "section 3581"; and

(2) in subsection (g)(3), by adding ", supervised release," after "parole", and by adding "supervised release," after "parole,".

SEC. 19. Section 504(a) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 504(a)) and section 411(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1111(a)) are amended—

(a) by deleting "Board of Parole of the United States Department of Justice" and substituting "if the offense is a Federal offense, the sentencing judge or, if the offense is a State or local offense, on motion of the United States Department of Justice, the district court of the United States for the district in which the offense was committed";

(b) by adding ", pursuant to sentencing guidelines and policy statements issued pursuant to 28 U.S.C. 994(a),";

(c) by deleting "Board" and "Board's" and substituting "court" and "court's", respectively; and

(d) by deleting "an administrative" and substituting "a".

SEC. 20. Section 411 (c)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1111(c)(3)) is amended by adding "or supervised release" after "parole".

SEC. 21. Section 454(b) of the Comprehensive Employment and Training Act of 1973, as added by section 2 of the Act of October 27, 1978 (29 U.S.C. 927(b)), is amended by deleting "or parole" the first place it appears and substituting ", parole, or supervised release".

SEC. 22. The Public Health Service Act (42 U.S.C. 201 et seq.) is amended as follows:

(a) Section 341(a) (42 U.S.C. 257(a)) is amended by deleting "or convicted of offenses against the United States and sentenced to treatment" and "addicts who are committed to the custody of the Attorney General pursuant to provisions of the Federal Youth Corrections Act (chapter 402 of title 18 of the United States Code),".

(b) Section 343(d) (42 U.S.C. 259(d)) is amended by adding "or supervised release" after "parole".

SEC. 23. Section 11507 of title 49, United States Code, is amended by adding ", supervised release," after "parole".

SEC. 24. Section 10(b)(7) of the Military Selective Service Act (50 U.S.C. App. 460(b)(7)) is amended by deleting "parole" and substituting "release".

EFFECTIVE DATE

SEC. 25. (a)(1) This Act shall take effect on the first day of the first calendar month beginning twenty-four months after the date of enactment, except that—

(A) the repeal of chapter 402 of title 18, United States Code, shall take effect on the date of enactment; and

(B)(i) chapter 58 of title 28, United States Code, shall take effect on the date of enactment of this Act or October 1, 1983, whichever occurs later, and the United States Sentencing Commission shall submit the initial sentencing guidelines promulated to section 994(a)(1) of title 28 to the Congress within eighteen months of the effective date of the chapter; and

(ii) the sentencing guidelines promulgated pursuant to section 994(a)(1), and the provisions of sections 3581, 3583, and 3624 of title 18, United States Code, shall not go into effect until the day after—

(a) the United States Sentencing Commission has submitted the initial set of sentencing guidelines to the Congress pursuant to subparagraph (B)(i), along with a report stating the reasons for the Commission's recommendations;

(b) the General Accounting Office has undertaken a study of the guidelines, and their potential impact in comparison with the operation of the existing sentencing and parole release system, and has, within 150 days of submission of the guidelines, reported to the Congress the results of its study; and

(c) the Congress has had six months after the date described in subclause (a) in which to examine the guidelines and consider the reports.

(2) For the purposes of section 992(a) of title 28, the terms of the first members of the United States Sentencing Commission shall not begin to run until the sentencing guidelines go into effect pursuant to paragraph (1)(B)(ii).

(b)(1) The following provisions of law in effect on the day before the effective date of this Act shall remain in effect for five years after the effective date as to an individual convicted of an offense or adjudicated to be a juvenile delinquent before the effective date and as to a term of imprisonment during the period described in subsection (a)(1)(B):

(A) Chapter 311 of title 18, United States Code.

(B) Chapter 309 of title 18, United States Code.

(C) Sections 4251 through 4255 of title 18, United States Code.

(D) Sections 5041 and 5042 of title 18, United States Code.

(E) Sections 5017 through 5020 of title 18, United States Code, as to a sentence imposed before the date of enactment.

(F) The maximum term of imprisonment in effect on the effective date for an offense committed before the effective date.

(G) Any other law relating to a violation of a condition of release or to arrest authority with regard to a person who violates a condition of release.

(2) Notwithstanding the provisions of section 4202 of title 18, United States Code, as in effect on the day before the effective date of this Act, the term of office of a Commissioner who is in office on the effective date is extended to the end of the five-year period after the effective date of this Act.

(3) The United States Parole Commission shall set a release date, for an individual who will be in its jurisdiction the day before the expiration of five years after the effective date of this Act, that is within the range that applies to the prisoner under the applicable parole guideline. A release date set pursuant to this paragraph shall be set early enough to permit consideration of an appeal of the release date, in accordance with Parole Commission procedures, before the expiration of five years following the effective date of this Act.

(4) Notwithstanding the other provisions of this subsection, all laws in effect on the day before the effective date of this Act pertaining to an individual who is—

(A) released pursuant to a provision listed in paragraph (1); and

(B)(i) subject to supervision on the day before the expiration of the five-year period following the effective date of this Act; or

(ii) released on a date set pursuant to paragraph (3);

including laws pertaining to terms and conditions of release, revocation of release, provision of counsel, and payment of transportation costs, shall remain in effect as to the individual until the expiration of his sentence, except that the district court shall determine, in accord with the Federal Rules of Criminal Procedure, whether release should be revoked or the conditions of release amended for violation of a condition of release.

(5) Notwithstanding the provisions of section 991 of title 28, United States Code, and sections 4351 and 5002 of title 18, United States Code, the Chairman of the United States Parole Commission or his designee shall be a member of the National Institute of Corrections, and the Chairman of the United States Parole Commission shall be a member of the Advisory Corrections Council and a nonvoting member of the United States Sentencing Commission, ex officio, until the expiration of the five-year period following the effective date of this Act. Notwithstanding the provisions of section 4351 of title 18, during the five-year period the National Institute of Corrections shall have seventeen members, including seven ex officio members. Notwithstanding the provisions of section 991 of title 28, during the five-year period the United States Sentencing Commission shall consist of nine members, including two ex officio, nonvoting members.

SEC. 26. (a)(1) Four years after the sentencing guidelines promulgated pursuant to section 994(a)(1), and the provisions of sections 3581, 3583, and 3624 of title 18, United States Code, go into effect, the General Accounting Office shall undertake a study of the guidelines in order to determine their impact and compare the guidelines system with the operation of the previous sentencing and parole release system, and, within six months of the undertaking of such study, report to the Congress the results of its study.

(2) Within one month of the start of the study required under subsection (a), the United States Sentencing Commission shall submit a report to the General Accounting Office, all appropriate courts, the Department of Justice, and the Congress detailing the operation of the sentencing guideline system and discussing any problems with the system or reforms needed. The report shall include an evaluation of the impact of the sentencing guidelines on prosecutorial discretion, plea bargaining,

disparities in sentencing, and the use of incarceration, and shall be issued by affirmative vote of a majority of the voting members of the Commission.

(b) The Congress shall review the study submitted pursuant to subsection (a) in order to determine—

(1) whether the sentencing guideline system has been effective;

(2) whether any changes should be made in the sentencing guideline system; and

(3) whether the parole system should be reinstated in some form and the life of the Parole Commission extended.

DISCUSSION OF AMENDMENT

The amendment in the nature of a substitute, in essence, incorporates into S. 668 the provisions adopted by the Committee with respect to title II (sentencing) of a broader package of criminal provisions. As introduced, S. 668 and title II of S. 829 contained substantially identical provisions. The Committee considered an original comprehensive Committee bill on July 21, 1983, that contained a substantial number of relatively minor changes in the sentencing title over the comparable provisions in S. 668 or S. 829. During the course of the consideration of the comprehensive bill, a number of other amendments to the sentencing title were adopted by the Committee. This bill as adopted was ultimately introduced (S. 1762), referred to the Committee, and reported August 4, 1983. Title II of S. 1762 contained the sentencing provisions approved by the Committee. The amendment to S. 668 in the nature of a substitute is identical to the language of title II of S. 1762, with only necessary technical changes. The main body of the report explains the amendment.

GENERAL STATEMENT

S. 668 and title II of S. 1762 represent the first comprehensive sentencing law for the Federal system. They are the culmination of a reform effort begun more than a decade ago by the National Commission on Reform of Federal Criminal Laws [1] and championed in recent years by former United States district judges Marvin E. Frankel and Harold R. Tyler, Dean Norval Morris of the University of Chicago Law School, Professor Alan Dershowitz of Harvard Law School, and numerous others, including Senators John L. McClellan, Roman L. Hruska, Edward M. Kennedy, Strom Thurmond, and Joseph Biden. After extensive hearings on the National Commission's Final Report and other proposals, which resulted in further refinement of the proposals, comprehensive sentencing reform provisions were included in S. 1437, as reported in the 95th Congress by this Committee (S. Rept. No. 95-605) and overwhelmingly passed by the Senate on January 30, 1978. These comprehensive sentencing provisions were carried forward in S. 1722 (S. Rept. No. 96-553) in the 96th Congress and in S. 1630 (S. Rept. No. 97-307) in the 97th Congress, both of which were reported with nearly unanimous votes by the Committee, with further refinements resulting from additional research and suggestions received by the Committee since S. 1437 was passed. The proposals received the strong endorsement of the Attorney General's Task Force on Violent Crime[2] and were included in S. 2572 as passed by the Senate on September 30, 1982, by a vote of 95 to 1, and added to H.R. 3963.

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[1] National Commission on Reform of Federal Criminal Laws, Final Report (1971), reprinted in Subcommittee Criminal Code Hearings, Part I, at 129-514 (hereinafter cited as National Commission Final Report).

On March 3, 1983, Senator Kennedy introduced S. 668—the "Sentencing Reform Act of 1983."[3] On March 16, 1983, Senators Thurmond and Laxalt introduced S. 829 on behalf of the Administration, a sixteen title bill that proposed in title II substantially identical sentencing provisions to those in S. 668. Five days of hearings by the Subcommittee on Criminal Law were held on a number of crime proposals, including S. 668 and S. 829.[4] One of the days, chaired by Senator Kennedy, focused exclusively on sentencing reform and the reaction of victims of violent crime to sentences imposed under current practices.

The urgent need for, and the reaffirmation of his commitment to, enactment of sentencing reform legislation for the Federal system was unequivocally stated by Senator Kennedy when he introduced S. 668 at the beginning of the Congress:[5]

> Federal criminal sentencing is in desperate need of reform. * * *
>
> The current system is actually a nonsystem. It is unfair to the defendant, the victim, and society. It defeats the reasonable expectation of the public that a reasonable penalty will be imposed at the time of the defendant's conviction, and that a reasonable sentence actually will be served.
>
> The reforms needed to achieve a workable, rational sentencing system are neither too complicated to legislate, nor too difficult to implement. The legislation which I introduce today clearly articulates the purpose of sentencing, establishes a sentencing commission to develop guidelines for sentencing, abolishes parole, and provides for appellate review of sentences which are outside the guidelines.
>
> Federal sentencing reform is long overdue. During the several years that this proposal has been pending in Congress, it has served as a model for sentencing reform at the State and local level. I look forward to early action on sentencing reform by both the Senate and the House of Representatives.

In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the Parole Commission is to determine when to release the prisoner because he is "rehabilitated." Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another—convicted of the very same crime and possessing a comparable criminal history—may be sentenced to a lengthy term of imprisonment. Even two such offenders who are sentenced to terms of imprisonment for similar offenses may receive widely differing prison release dates; one may be sentenced to a relatively short term and be released after serving most of the sentence, while the other may be sentenced to a relatively long term but be denied parole indefinitely.[6]

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[2] See Attorney General's Task Force on Violent Crime, Final Report 56–57 (1981) (hereinafter cited as Task Force Final Report).

[3] Senator Kennedy was joined as original cosponsors on S. 668 by Senators Thurmond, Biden, Laxalt, Baucus, DeConcini, Hatch, Leahy, Metzenbaum, Simpson, Specter, Abdnor, Hawkins, Cohen, D'Amato, Chiles, Glenn, Huddleston, Lugar, Stevens, Zorinsky, Moynihan, and Sasser.

[4] Crime Control Act Hearings.

[5] 129 Congressional Record p. S2090 (Mar. 3, 1983) (daily ed.).

These disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any statutory guidance or review procedures to which courts and parole boards might look.[7] These problems are compounded by the fact that the sentencing judges and parole officials are constantly second-guessing each other, and, as a result, prisoners and the public are seldom certain about the real sentence a defendant will serve.

In order to alleviate these problems, the Committee set several goals that it believes any sentencing reform legislation should meet.

First, sentencing legislation should contain a comprehensive and consistent statement of the Federal law of sentencing, setting forth the purposes to be served by the sentencing system and a clear statement of the kinds and lengths of sentences available for Federal offenders.

Second, it should assure that sentences are fair both to the offender and to society, and that such fairness is reflected both in the individual case and in the pattern of sentences in all Federal criminal cases.

Third, it should assure that the offender, the Federal personnel charged with implementing the sentence, and the general public are certain about the sentence and the reasons for it.

Fourth, it should assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case.

Fifth, it should assure that each stage of the sentencing and corrections process, from the imposition of sentence by the judge, and as long as the offender remains within the criminal justice system, is geared toward the same goals for the offender and for society.

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[6] Such disparate release dates are the result of the wide discretion granted to sentencing judges and the United States Parole Commission under current Federal law. See 18 U.S.C. 4203 (powers and duties of the Commission); 18 U.S.C. 4206 (parole determination criteria: prisoner may be released by the Commission "upon consideration of the offense and the history and characteristics of the prisoner * * * and pursuant to guidelines promulgated by the Commission.* * * [The] Commission may [also] grant or deny release on parole notwithstanding [These] guidelines * * * if it determines there is good cause for so doing * * *"); 18 U.S.C. 4207 (allowing the Parole Commission to consider reports from any and all sources).

[7] Review of sentences imposed by the courts is confined to two special sentencing statutes (18 U.S.C. 3576, relating to dangerous special offenders, and 21 U.S.C. 849, relating to dangerous special drug offenders) unless the sentence is illegal. Review of decisions of the Parole Commission is generally confined to the question of whether it has abused its discretion.

Unfortunately, current Federal law fails to achieve any of these goals. Each participant in the process, from the courts through the probation and parole systems, does the best it can with the legislative tools at hand, but none is able to reach these goals without substantial sentencing reform legislation.

Following is a brief description of current sentencing law and the attempts of the Federal criminal justice system to ameliorate the problems caused by that law. That description is followed by a summary of the sentencing reform proposals in the bill, as reported, and a discussion of how those proposals will achieve the goals set by the Committee. More detailed descriptions of current law and the sentencing provisions are contained in the section-by-section analysis.

CURRENT FEDERAL SENTENCING LAW

1. Lack of comprehensiveness and consistency

Current Federal law contains no general sentencing provision. Instead, current law specifies the maximum term of imprisonment and the maximum fine for each Federal offense in the section that describes the offense.[8] These maximums are usually prescribed with little regard for the relative seriousness of the offense as compared to similar offenses.[9]

Current law also contains several specialized sentencing statutes that are each applicable to narrow classes of offenders—offenders between the ages of 18 and 22,[10] offenders between 22 and 26,[11] nonviolent offenders who are drug addicts,[12] offenders who are "dangerous special offenders," [13] and offenders who are "dangerous special drug offenders." [14] Other categories of offenders that might just as logically be covered by specialized statutes are left undifferentiated.

The sentencing provisions of current law were originally based on a rehabilitation model in which the sentencing judge was expected to sentence a defendant to a fairly long term of imprisonment. The defendant was eligible for release on parole after serving one-third of his term. The Parole Commission was charged with setting his release date if it concluded that he was sufficiently rehabilitated.[15] At present, the concepts of indeterminate sentencing and parole release depend for their justification exclusively upon this model of "coercive" rehabilitation—the theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons.

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[8] For most offenses, the judge may suspend execution or imposition of the sentence and place the convicted offender on probation, or impose a split sentence of up to six months in prison followed by probation. See 18 U.S.C. 3651.

[9] For example, there are approximately 130 theft offenses under current law, with maximum sentences ranging from no imprisonment and a $500 fine, 18 U.S.C. 288, to ten years of imprisonment and a $10,000 fine, 18 U.S.C. 641. While the theft statutes occasionally vary the penalty according to the amount that is stolen, e.g., 18 U.S.C. 288, there is little difference among offenses that would justify differences in sentences. Embezzlement is an excellent illustration. The maximum penalty for embezzling manpower finds is a $10,000 fine and two years of imprisonment if the amount embezzled is more than $100; if the amount embezzled is not more than $100, the maximum penalty is a $1,000 fine and one year of imprisonment, 18 U.S.C. 665(a). If a bankruptcy trustee embezzles any amount of money from a bankrupt estate, the maximum penalty is a $5,000 fine and five years of imprisonment, 18 U.S.C. 153. If a person entrusted with public funds embezzles them, the maximum penalty, if the amount embezzled is more than $100, is a fine of the amount embezzled and ten years of imprisonment; if the amount embezzled is $100 or less, the maximum penalty is a $1,000 fine and one year of imprisonment, 18 U.S.C. 648.

[10] 18 U.S.C. 5005 *et seq.*

[11] 18 U.S.C. 4216.

[12] 18 U.S.C. 4251 *et seq.*

[13] 18 U.S.C. 3575 *et seq.*

[14] 21 U.S.C. 849.

Recent studies suggest that this approach has failed,[16] and most sentencing judges as well as the Parole Commission agree that the rehabilitation model is not an appropriate basis for sentencing decisions.[17] We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated. Until the present sentencing statutes are changed, however, judges and the Parole Commission are left to exercise their discretion to carry out what each believes to be the purposes of sentencing.

2. *Disparity and uncertainty in current Federal sentencing*

a. Practices of the Federal judiciary

The absence of a comprehensive Federal sentencing law and of statutory guidance on how to select the appropriate sentencing option creates inevitable disparity in the sentences which courts impose on similarly situated defendants.[18] This occurs in sentences handed down by judges in the same district and by judges from different districts and circuits in the Federal system.[19] One judge may impose a relatively long prison term to rehabilitate or incapacitate the offender. Another judge, under similar circumstances, may sentence the defendant to a shorter prison term simply to punish him, or the judge may opt for the imposition of a term of probation in order to rehabilitate him.[20]

For example, in 1974, the average Federal sentence for bank robbery was eleven years, but in the Northern District of Illinois it was only five and one-half years. Similar discrepancies in Federal sentences for a number of different offenses were found in a landmark study by the United States Attorney's Office for the Southern District of New York.[21] Further probative evidence may be derived from another 1974 study in which fifty Federal district court judges from the Second Circuit were given twenty identical files drawn from actual cases and were asked to indicate what sentence they would impose on each defendant.[22] The variations in the judges' proposed sentences in each case were astounding, as shown in the following chart:

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[15] See 45 Cong. Rec. 6374 (1910) (remarks of Rep. Clayton).

[16] Several published analyses of correctional treatment and programs illustrate their ineffectiveness. See Robinson & Smith, *The Effectiveness of Correctional Programs*, 17 Crime and Delinquency 67 (1971); Martinson, *What Works: Questions and Answers about Prison Reform*, 1947 Pub. Int. 22; D. Lipton, R. Martinson & J. Wilks, *Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (1975). See also D. Greenburg, *Much Ado about Little: The Correctional Effects of Corrections* (June, 1974) (unpublished summary of effectiveness studies prepared for the Committee for the Study of Incarceration); also discussed in A. Von Hirsch, *Doing Justice: The Choice of Punishments*, 14–15 (1976), which concludes that "the rehabilitative disposition is plainly untenable". *Id.* at 18.

[17] The Parole Commission does provide a small amount of advancement in the presumptive release date for "documented sustained superior program achievement over a period of 9 months or more in custody," and permits partial advancement even if there have been minor disciplinary infractions (28 C.F.R. § 2.60 (1982)).

[18] A recent study indicates that federal judges disagree considerably about the purposes of sentencing. While one-fourth of the judges thought rehabilitation was an extremely important goal of sentencing, 19 percent thought it was no more than "slightly" important; conversely, about 25 percent thought "just deserts" was a very important or extremely important purpose of sentencing, while 45 percent thought it was only slightly important or not important at all. INSLAW, Inc., and Yankelovich, Skelly, and White, *Federal Sentencing: Toward a More Explicit Policy of Criminal Sanctions*, III–4 (1981) (hereinafter cited as Federal Sentencing Study).

[19] See *id.* at III–19 to III–21.

[20] *Id.* at III–9 to III–14.

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[21] Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 163, reprinted in 119 Cong. Rec. 6060 (1973). For example, "[t]he range in average sentences for forgery runs from 30 months in the Third Circuit to 82 months in the District of Columbia. For interstate transportation of stolen motor vehicles, the extremes in average sentences are 22 months in the First Circuit and 42 months in the Tenth Circuit," *Id.* at 167.

[22] Partridge and Eldridge, *The Second Circuit Sentencing Study, A Report to the Judges* 1-3 (1974). Designed as a self-evaluation, the study involved 43 active judges and seven of the senior judges of the six judicial districts constituting the Second Circuit. To avoid the customary complications introduced by differences in cases, and to insure a focus upon differences in judges' sentencing behavior, the study asked these 50 judges to impose sentence on 20 different defendants charged with those Federal offenses most representative of the Circuit's workload. The judges were given the same representative presentence report prepared for each hypothetical offender. The total number of sentences—901—roughly approximated the number of sentences these judges would normally render in a 6 month period.

2D CIRCUIT SENTENCING STUDY

[20 cases]

	Most severe sentence	6th most severe sentence	12th most severe sentence	Median sentence
Case 1: Extortionate credit transactions; income tax violations..	20 yr pris.; $65,000	15 yr pris.; $50,000	15 yr pris.;	10 yr pris.; $50,000
Case 2: Bank robbery	18 yr pris. $5,000	15 yr pris	15 yr pris. [(a)(2)]	10 yr pris.
Case 3: Sale of heroin	10 yr pris. 5 yr prob	6 yr pris.; 5 yr prob	5 yr pris.; 5 yr prob. [(a)(2)]	5 yr pris.; 3 yr.
Case 4: Theft and possession of stolen goods	7.5 yr pris	5 yr pris	4 yr pris	3 yr pris.
Case 5: Possession of barbiturates with intent to sell	5 yr pris.; 3 yr prob	3 yr pris.; 3 yr prob	3 yr pris.; 3 yr prob	2 yr pris.; 3 yr prob.
Case 6: Filing false income tax returns	3 yr pris.; $5,000	3 yr pris.; $5,000	2 yr pris.; $5,000	1 yr pris.; $5,000.
Case 7: Possession of heroin	2 yr pris	2 yr pris	1.5 yr pris	1 yr pris.
Case 8: Mail fraud	YCA indet	YCA indet	6 mo pris.; 5 yr prob. [§ 4209]	5 mo pris.; 5 yr prob. [§ 4209].
Case 9: Eluding examination and inspection by immigration officers; illegal entry after deportation.	3 yr pris	6 mo pris.; 2 yr unsup. prob.	6 mo pris	3 mo pris.; 21 mo unsup. prob.
Case 10: Postal embezzlement	1 yr pris	6 mo pris.; 1 yr prob	3 mo pris., 27 mo prob	2 mo pris.; 1 yr prob.
Case 11: Bribery	6 mo pris.; 6 mo prob.; $5,000	6 mo pris.; $2,500	2 mo pris.; 22 mo prob.; $5,000	1 mo pris.; 11 mo prob.; $5,000.
Case 12: Possession of unregistered firearm	1 yr pris	6 mo pris.; 3 yr prob	3 mo pris.; 21 mo prob	1 mo pris.; 11 mo prob.
Case 13: Possession of counterfeit currency	1.5 yr pris	6 mo pris.; 2 yr prob	6 mo pris.; 18 mo prob	5 yr prob.
Case 14: Altering a forged U.S. Treasury check	YCA indet	YCA indet	1 yr pris	4 yr prob.
Case 15: Operating an illegal gambling business	1 yr pris.; $3,000	6 mo pris.; 3 yr prob.; $10,000	3 mo pris.; 2 yr prob.; $5,000	3 yr prob.; $10,000.
Case 16: Bank embezzlement	YCA indet	5 yr prob	3 yr prob	3 yr prob.
Case 17: Interstate transportation of stolen securities.	3 yr pris	6 mo pris.; 4.5 yr prob	6 mo pris	3 yr prob.
Case 18: Mail theft	6 mo pris.; 18 mo prob	5 yr prob	3 yr prob.; $100	3 yr prob.
Case 19: Conspiracy to commit securities fraud	2 yr pris.; $2,500	6 mo pris.; 2 yr prob	3 mo pris.; 33 mo prob.; $7,500	2 yr prob.; $15,000.
Case 20: Perjury	1 yr pris.; $1,000	3 mo pris.; $1,000	3 yr prob.; $1,000	2 yr prob.; $500.

2D CIRCUIT SENTENCING STUDY

[20 cases]

	12th least severe sentence	6th least severe sentence	Least severe sentence	Sentences ranked
Case 1: Extortionate credit transactions; income tax violations	8 yr pris.; $20,000	5 yr pris.; 3 yr prob.; $10,000	3 yr pris	45
Case 2: Bank robbery	7.5 yr pris.; [(a)(2)]	5 yr pris	5 yr pris	48
Case 3: Sale of heroin	3 yr pris.; 3 yr prob	3 yr pris.; 3 yr prob	1 yr pris.; 5 yr prob	46
Case 4: Theft and possession of stolen goods	3 yr pris	2 yr pris	4 yr prob	45
Case 5: Possession of barbiturates with intent to sell	1.5 yr pris.; 3 yr prob	5 yr prob.; $500	2 yr prob	42
Case 6: Filing false income tax returns	6 mo pris.; 2.5 yr prob; $3,000	6 mo pris.; $5,000	3 mo pris.; $5,000	48
Case 7: Possession of heroin	6 mo pris.; 18 mo prob	3 mo pris	1 yr prob	39
Case 8: Mail fraud	2 mo pris.; 2 yr prob. [§ 4209]	3 yr prob	1 yr prob	41
Case 9: Eluding examination and inspection by immigration officers; illegal entry after deportation.	1 mo pris.; 2 yr unsup. prob	2 yr unsup. prob	Susp. if leave U.S.	49
Case 10: Postal embezzlement	3 yr prob	2 yr prob	1 yr prob	48
Case 11: Bribery	2 yr prob.; $7,500	$7,500; 2 yr unsup. prob	$2,500	43
Case 12: Possession of unregistered firearm	2 yr prob	1 yr prob	6 mo prob	44
Case 13: Possession of counterfeit currency	2 yr prob	2 yr prob	2 yr prob	48
Case 14: Altering a forged U.S. Treasury check	2 yr prob	2 yr prob	1 yr prob	39
Case 15: Operating an illegal gambling business	2 yr prob.; $5,000	2 yr prob.; $1,000	1 yr prob.; $1,000	45
Case 16: Bank embezzlement	2 yr prob	2 yr prob	2 yr unsup. prob	42
Case 17: Interstate transportation of stolen securities	3 yr prob	2 yr prob	1 yr prob	46
Case 18: Mail theft	2 yr prob	2 yr prob	1 yr prob	48
Case 19: Conspiracy to commit securities fraud	2 yr prob.; $400	1 yr prob.; $7,500	$2,500	47
Case 20: Perjury	1 yr prob.; $1,500	1 yr prob.; $500	$1,000	48

Note.—References to "(a)(2)" signify a sentence pursuant to former 18 U.S.C. § 4208(a)(2), under which the defendant is given an indeterminate sentence and is eligible for parole at any time determined by the Board of Parole.
References to "§ 4209" signify a sentence pursuant to former 18 U.S.C. § 4209, under which young adult offenders (under age 26) are given specialized treatment.
References to "YCA indet." signify an indeterminate sentence for young offenders under age 22 pursuant to 18 U.S.C. § 5010.
See also Seymour, supra note 21 at 166–67.

In one extortion case, for example, the range of sentences varied from twenty years imprisonment and a $65,000 fine to three years imprisonment and no fine! [23]

The findings of the Second Circuit study have been reconfirmed in a study performed for the Department of Justice in which 208 active Federal judges specified the sentences they would impose in 16 hypothetical cases, 8 bank robbery cases, and 8 fraud cases. In only 3 of the 16 cases was there a unanimous agreement to impose a prison term. Even where most judges agreed that a prison term was appropriate, there was a substantial variation in the lengths of prison terms recommended.[24] In one fraud case in which the mean prison term was 8.5 years, the longest term was life in prison. In another case the mean prison term was 1.1 years, yet the longest prison term recommended was 15 years.[25]

The study also concluded that, while 45 percent of the variance in sentences for hypothetical cases was attributable to differences in offense and offender characteristics, 21 percent was directly attributable to the fact that some judges tend to give generally tough or generally lenient sentences,[26] and 22 percent of the variation was attributable to interactions between the "judge factor" and other factors. For example, some judges sentence more harshly for a particularly offense than other judges even though they do not sentence more harshly overall, and some judges sentence relatively more harshly than other judges if the defendant has a prior record.[27]

Following is the tabie from the report showing the differences in decisions whether to incarcerate and the length of incarceration:

EXHIBIT III.8.—SUMMARY OF JUDGES' SENTENCING RECOMMENDATIONS FOR THE 16 SCENARIOS [1]

	Percentage recommending imprisonment (N=208)	Mean prison term (years) (N=208)	Longest prison term (years)	Standard deviation (years)	Mean supervised time (years) (N=212)	Mean fine (N=170)
1. Bank robbery	96.6	7.3	25	6.1	1.6	$59
2. Fraud	98.1	3.7	27	2.5	1.1	279
3. Bank robbery	99.0	12.2	25	7.9	1.7	147
4. Fraud	49.0	1.0	10	1.9	2.3	297
5. Bank robbery	99.5	11.1	25	6.2	1.5	85
6. Fraud	99.0	4.0	25	3.2	1.4	206
7. Bank robbery	100.0	15.3	25	6.2	2.1	238
8. Fraud	46.2	1.1	15	2.3	2.4	240
9. Fraud	100.0	8.5	([2])	4.2	1.6	5,221
10. Bank robbery	97.6	6.6	22	4.0	1.5	1,276
11. Fraud	99.0	5.4	15	4.2	1.3	4,688

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[23] Partridge and Eldridge, *id.* at 5. Recent studies of other jurisdictions confirm the existence of widespread sentencing disparity. See, e.g., L. Wilkins, J. Kress, D. Gottfredson, J. Caepin, and A. Gelman, *Sentencing Guidelines: Structuring Judicial Discretion* (1978) (1976 study of Colorado and Vermont); Austin & Williams III, *A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*, 68 J. Crim. L.C. & P.S. 306 (1977) (study of 47 Virginia district court judges); Diamond and Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. Chi. L. Rev. 109 (1975) (Northern District of Illinois and Eastern District of New York); Comment, *Texas Sentencing Practices: A Statistical Study*, 45 Tex. L. Rev. 471 (1967) (Texas).

[24] Federal Sentencing Study, *supra* note 18 at III-16.

[25] *Id.*, Exhibit III-8.

[26] *Id.* at III-17.

[27] *Id.* at III-17 to III-18. For more details of the study, see Bartolomeo, Clancy, Richardson, and Berger, *Sentence Decision Making: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity* (1981).

EXHIBIT III.8.—SUMMARY OF JUDGES' SENTENCING RECOMMENDATIONS FOR THE 16 SCENARIOS [1]—Continued

	Percentage recommending imprisonment (N=208)	Mean prison term (years) (N=208)	Longest prison term (years)	Standard deviation (years)	Mean supervised time (years) (N=212)	Mean fine (N=170)
12. Bank robbery	100.0	10.0	25	5.0	1.7	1,618
13. Fraud	99.5	6.1	27	3.2	1.5	3,365
14. Bank robbery	90.4	5.3	20	4.1	1.6	2,212
15. Fraud	93.3	4.1	15	3.7	1.6	2,940
16. Bank robbery	90.0	10.2	25	3.7	1.6	1,721
All bank robberies	96.6	9.8			1.7	919
All frauds	85.5	4.2			1.7	2,154

[1] Scenarios are described in Exhibits III.6 and III.7.

[2] Life.

In addition, as indicated in the following chart, a study of the two districts in each of the 11 Federal judicial circuits that sentenced the greatest number of offenders in 1972 for a selected group of offenses shows widespread sentencing disparity:

TABLE 1.—AVERAGE SENTENCE LENGTH FOR SELECTED OFFENSES, IN 1972

[In months]

	Homicide and assault	Robbery	Burglary	Larceny	Auto theft	Forgery and counterfeiting
National average	102	120	63	40	38	42
Maine				144 (+104)	21 (−17)	24 (−18)
Massachusetts	48 (−54)	115 (−5)	40 (−23)	36 (−4)	20 (−18)	32 (−10)
New York (northern)		39 (−81)		11 (−29)	9 (−29)	12 (−30)
New York (eastern)	18 (−84)	130 (+10)	2 (−61)	48 (+8)	12 (−26)	49 (+7)
New Jersey	11 (−91)	103 (−17)	27 (−36)	50 (+10)	32 (−6)	29 (−13)
Pennsylvania (eastern)	102 (0)	88 (−32)		25 (+15)	49 (+11)	30 (−12)
Maryland	6 (−96)	146 (+26)	61 (−2)	45 (+5)	49 (+11)	40 (−2)
Virginia (eastern)	66 (−36)	135 (+15)	81 (+81)	50 (+10)	41 (+3)	39 (−3)
Florida (middle)		126 (+6)	34 (−29)	27 (−3)	32 (−6)	41 (−1)
Texas (northern)	62 (−40)	224 (+104)	46 (−17)	42 (+2)	39 (+1)	66 (+24)
Kentucky (eastern)	24 (−78)	124 (+4)	167 (+104)	25 (−15)	32 (−6)	20 (−22)
Ohio (northern)	28 (−74)	119 (−1)	36 (−27)	29 (−11)	31 (−7)	35 (−7)
Illinois (northern)	20 (−82)	81 (−39)	30 (−33)	40 (0)	45 (+7)	38 (−4)
Indiana (southern)	40 (−62)	101 (−19)	24 (−39)	35 (−5)	29 (−9)	34 (−8)
Missouri (eastern)	27 (−75)	180 (+60)	60 (−3)	54 (+14)	46 (+8)	46 (+4)
Missouri (western)	36 (−66)	120 (0)		57 (+17)	36 (−2)	33 (−9)
California (northern)	79 (−23)	115 (−5)	120 (+57)	32 (−8)	42 (+4)	37 (−5)
California (central)	190 (+88)	96 (+24)	24 (−39)	40 (0)	41 (+3)	43 (+1)
Kansas	74 (−28)	115 (−5)		46 (+6)	47 (+9)	63 (+21)
Oklahoma (western)	29 (−73)	85 (−35)	48 (−15)	31 (−9)	36 (−2)	41 (−1)
District of Columbia	161 (+59)	103 (−17)	84 (+21)	42 (+2)	40 (+2)	67 (+25)

Note.—The federal district courts for each of the 11 circuits were chosen on the basis of the 2 districts in each circuit that sentenced the greatest number of offenders for the selected offenses.

Source: Administrative Office of the United States Courts, "Federal Offenders in United States District Courts," 1972, app. table X–4. O'Donnell, Churgin and Curtis, "Toward A Just and Effective Sentencing System: Agenda For Legislative Reform" (Praeger, 1977).

The Committee finds that this research makes clear that variation in offense and offender characteristics does not account for most of the disparity.[28]

Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public.

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[28] See Subcommittee Criminal Code Hearings, Part XIII, at 8870, 8881, 8897, 8903, 8916, 8960; Criminal Code Hearings, Part XVI, at 11752, 11786-87, 11911.

A sentence that is unjustifiably high compared to sentences for similarly situated offenders is clearly unfair to the offender; a sentence that is unjustifiably low is just as plainly unfair to the public. Such sentences are unfair in more subtle ways as well. Sentences that are disproportionate to the seriousness of the offense create a disrespect for the law. Sentences that are too severe create unnecessary tensions among inmates and add to disciplinary problems in the prisons.[29]

b. Policies and practices of the Parole Commission

In response to the lack of consistency apparent in the prison sentences imposed by the Federal Courts, the Parole Commission, in turn, releases prisoners according to its view of the appropriate term of imprisonment. In recent years, the Parole Commission has attempted to perform its function with two goals in mind: first, it has sought to reduce unwarranted disparity in judicially imposed prison terms by utilizing parole guidelines[30] that recommend appropriate periods of incarceration for different offenses and offender characteristics. Second, it has sought to increase certainty in prison release dates by setting a "presumptive release date" in most cases within a few months of commencement of the term of imprisonment.[31]

By dividing the sentencing authority between the judge and the Parole Commission, however, current law actually promotes disparity and uncertainty. First, the dangers of an unfettered exercise of discretion can occur at the time that an offender is released on parole as well as at the initial sentencing. For this reason, any comprehensive plan for reform should (1) take into account the division of authority that currently exists between the sentencing judge and the Parole Commission, (2) consolidate that authority, and (3) develop a system of sentencing whereby the offender, the victim, and society all know the prison release date at the time of the initial sentencing by the court, subject to minor adjustments based on prison behavior called "good time."[32]

Second, the existence of the Parole Commission invites judicial fluctuation by encouraging judges to keep the availability of parole in mind when they sentence offenders.[33] Sentencing judges, trying to anticipate what the Parole Commission will do, undoubtedly are tempted to sentence a defendant on the basis of when they believe the Parole Commission will release him.[34] In doing so, some judges deliberately impose sentences above the parole guidelines, leaving the Parole Commission to set the presumptive release date. Other judges impose sentences consistent with or below the guidelines in order to retain control over the release date.[35]

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[29] Subcommittee Criminal Code Hearings, Part XIII, at 9095.

[30] 28 C.F.R. § 2.20 (1982). "Whether wisely or not, Congress has decided that the [Parole] Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges." *United States* v. *Addonizio*, 442 U.S. 178, 188–189 (1979), citing S. Cong. Rept. 94–368, 94th Cong., 1st Sess., at 19 (1976).

[31] 28 C.F.R. § 2.12 (1982). The date may be advanced only for superior program achievement (see 28 C.F.R. § 2.60 (1982)) or for other "clearly exceptional circumstances" (28 C.F.R. § 2.14(a)(2)(ii)). It may be retarded or rescinded for disciplinary infractions (28 C.F.R. § 2.14(a)(2)(iii) and 2.36).

[32] See 18 U.S.C. 4161–4166.

[33] The presentence report informs the sentencing judge as to the probable application of the parole guidelines in each case. See Division of Probation, Administrative Office of the United States Courts, *The Presentence Investigation Report*, pp. 6 and 16 (1978). It is probable that some judges, believing that the parole release date specified in the guidelines is reasonable, impose sentences to imprisonment that assure parole eligibility during the guidelines range applicable in a particular case, while other judges may deliberately impose sentence below the parole guideline believing that it is too harsh or set a high sentence with parole eligibility above the guideline if it is believed to be too low.

A few examples may be helpful to clarify this and the following discussion. Suppose the parole guidelines prescribe a range of forty to fifty-two months of time to be served for a given offense. This prescription is based upon the offense and offender characteristics present in the particular case. Suppose further that the offense carries a statutory maximum prison sentence of twenty years. The judge sentences the offender to a term of three years imprisonment. By statute, the prisoner is eligible for parole after serving one-third of his sentence (one year).[36] and may not serve more than the maximum (three years) for that conviction.[37] The parole guidelines figure (forty to fifty-two months) never comes into play, and the Commission is powerless to make this particular sentence conform to the generally applied term prescribed by the guidelines. In such cases the Parole Commission generally will not parole the prisoner; thus, he serves the maximum sentence less good time.[38]

The second example follows from the first. If the offender is not sentenced to any term of imprisonment, he does not come within the jurisdiction of the Commission, and the guidelines are irrelevant.

In the third example, the judge sentences the offender to a prison term of fifteen years, and again the parole guidelines are circumvented. In this case the prisoner will not be eligible for parole until he serves one-third of his sentence (five years) unless the judge specifies that the prisoner should be eligible for an earlier parole date.[39] The five-year minimum is above the range prescribed by the guidelines. Here, the best that the Commission can do to eliminate sentence disparity is to parole the prisoner as soon as he is eligible, that is, after he has served five years of his sentence.

These examples make it clear that, operating under a guidelines system, the Parole Commission cannot completely eliminate unwarranted sentencing disparity if the courts do not cooperate. It should be added that even if the Commission abandoned its guidelines and attempted merely to carry out the courts' intentions regarding offenders sentenced to imprisonment, the chance of success would be small. At present, judges need not specify the reasons for their sentencing decisions, and usually they do not indicate the length of time they expect an offender to spend in prison. Thus, the Commission seldom has enough information upon which to base a release decision that conforms to the courts' intentions.

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[34] It is ironic that those who would retain parole on the ground that it is a valuable "safety valve" designed to shorten lengthy sentences imposed by judges who would ignore the guidelines established under S. 668 could very well be assuring that longer sentences would be imposed by judges trying to structure sentences to overcome prospectively the anticipated reduction by the Parole Commission. In addition, if parole eligibility is retained for a substantial percentage of a prison term, the sentencing guidelines would necessarily recommend far longer prison terms than if there were no parole release system. This would virtually assure that prison terms imposed by judges would bear no more resemblance to terms actually served than they do today. About half the prisoners within the jurisdiction of the Parole Commission are released at the expiration of sentence, less good time, rather than on parole. Of the 7,077 persons who were sentenced to terms of imprisonment of over one year and who were released from prison in the fiscal year ended September 30, 1977, 3,492 were released on parole. Federal Prison System, *Statistical Report Fiscal Year 1977*, Table C-1, p. 175. Comparable Bureau of Prisons statistics for fiscal year 1982 indicate that of 6,968 prisoners sentenced to terms of imprisonment in excess of one year who were released that year, 3,956 were released on parole. Federal Prison System, Statistical Report Fiscal year 1982, Table C-1.

[35] See 18 U.S.C. 4163.

[36] 18 U.S.C. 4205(a).

[37] 18 U.S.C. 4163.

[38] Criminal Code Hearings, Part XIV, at 10648-10651, 10665 note 29.

[39] 18 U.S.C. 4205(b)

The problems with the present system do not end here, however. The parole guidelines themselves contribute to disparity because the offenses are grouped according to "severity." Offenses are rarely distinguished according to such characteristics as the amount of harm done by the offense, the criminal sophistication of the offender, or the importance of the offender's role in an offense committed with others.[40] Similarly, in classifying offenders according to their criminal histories, the guidelines make few distinctions between major and minor previous offenses and give the same weight to all but very old prior offenses.[41]

Additionally, the parole guidelines frequently fail in practice to achieve their goal of reducing unwarranted sentencing disparities. In a recent study by the General Accounting Office, 35 hearing examiners of the Parole Commission were asked to indicate the release date they would set for each of a sample of 30 cases. The study found substantial disparities in the release dates. In 28 of the 30 cases there was a variation of more than one year.[42] The GAO attributed the inconsistencies to the lack of training of hearing examiners, who are not lawyers, and to weaknesses in the guidelines themselves.[43]

Nor can the Parole Commission, by setting a presumptive release date once an offender is within its jurisdiction, eliminate entirely the uncertainty inherent in current sentencing procedures.

As the previous examples made clear, a court-imposed term of imprisonment in excess of one year frequently has little to do with the amount of time that an offender will spend in prison. The announced term represents only the maximum length of time the offender may spend in prison if he earns no good time credits [44] and if the Parole Commission does not set a release date that falls before the date of expiration of the sentence.[45]

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[40] Recent amendments to the offense severity index for the parole guidelines provide more detailed distinctions in offense descriptions than previous formulations. See 47 Fed. Reg. 56336-41 (Dec. 16, 1982).

[41] See items A, B, and D in the salient factor score, 28 C.F.R. § 2.20 and the scoring instructions for those factors in 28 C.F.R. § 2.20-07.

[42] Comptroller General of the United States, *Federal Parole Practices: Better Management and Legislative Changes Are Needed* 15-20 (Rept. No. B-133223, 1982).

[43] *Id.* at 12-23.

[44] See 18 U.S.C. 4161 *et seq.*

[45] See 18 U.S.C. 4163.

The Supreme Court, in *United States* v. *Addonizio, supra* note 30, held that a sentence was not subject to collateral attack under 28 U.S.C. 2255 in a case in which the United States Parole Commission did not release the defendant at the time that the sentencing judge expected. The sentencing judge indicated in his decision in the section 2255 proceeding that he intended that, if the defendant's prison behavior was "exemplary," he would be released on parole after serving one-third of a 10-year term of imprisonment. The U.S. Parole Commission, considering not the defendant's behavior in prison but the seriousness of the offense, refused to release the defendant at that time. In denying Federal court jurisdiction over the section 2255 motion, the Supreme Court said:

"The import of [the] statutory scheme is clear: the judge has no enforcible expectations with respect to the actual release of a sentenced defendant short of his statutory term. The judge

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The presumptive release date set by the Commission is also subject to change, however. In a given case the Commission may either (1) tell a prisoner that he will be released at the expiration of his sentence less good time or (2) set another tentative release date. In the first case, the date of release is subject to constant adjustment by the Bureau of Prisons because of the withholding or forfeiture of all or part of the good time the prisoner has earned for compliance with institutional rules [46] and the possible restoration of part or all of that lost good time at a later date.[47] Alternatively, if the Commission decides to set a separate presumptive release date, it may move the date forward in exceptional cases or may delay it for disciplinary problems in prison. Finally, the Commission may adjust the release date for a rules violation that resulted in the withholding or forfeiture of good time and may delay the release date even though the Bureau of Prisons restored all good time lost for the same violation.[48]

c. Conclusion

These accounts of the present practices of the Federal courts and of the Parole Commission clearly indicate that sentencing in the Federal courts is characterized by unwarranted disparity and by uncertainty about the length of time offenders will serve in prison.

The lack of reasonable consistency in the sentences handed down by the courts is due in large part to the lack of a comprehensive Federal sentencing law. Federal statutes should provide clear guidance to Federal judges on how to select from among the available alternatives an appropriate sentence to impose upon the particular defendants before them. This disparity is fair neither to the offenders nor to the public.

The efforts of the Parole Commission to alleviate this disparity unfortunately contribute to a second grave defect of present law: no one is ever certain how much time a particular offender will serve if he is sentenced to prison. The present system encourages judges to sentence with the parole guidelines in mind, and it encourages the Parole Commission to release prisoners with its own purposes—not those of the sentencing judge—in mind.

Even in those cases where the Commission can adjust court-imposed sentences in order to bring the actual prison terms in line with those for similarly situated offenders across the country, the actual terms to be served are subject continually to the "good time" adjustments by the Bureau of Prisons and to counter-adjustments by the Parole Commission. Thus, prisoners often do not really know how long they will spend in prison until the very day

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may well have expectations as to when release is likely. But the actual decision is not his to make either at the time of sentencing or later if his expectations are not met. To require the Parole Commission to act in accordance with judicial expectations, and to use collateral attack as a mechanism for ensuring that these expectations are carried out would substantially undermine the congressional decision to entrust release decisions to the Commission and not the courts. Nothing in § 2255 supports—let alone mandates—such frustration of congressional intent." *Id.* at 190. Thus, "[w]hen parole boards exercised authority over release, judges' sentences were of secondary importance * * *". National Academy of Sciences, Panel on Sentencing Research, *Research on Sentencing: The Search for Reform* 57 (A. Blumstein, J. Cohen, S. Martin & M. Tonry, eds., 1983) (hereinafter cited as National Academy of Sciences Report).

[46] 18 U.S.C. 4165.

[47] 18 U.S.C. 4166.

[48] 28 C.F.R. §§ 2.12(d), 2.14(a)(2)(ii), 2.14(a)(2)(iii), 2.34, 2.36(a)(1), 2.60.

they are released. The result is that the existing Federal system lacks the sureness that criminal justice must provide if it is to retain the confidence of American society and if it is to be an effective deterrent against crime.

3. Limited availability of sentencing options

Current law is not particularly flexible in providing the sentencing judge with a range of options from which to fashion an appropriate sentence. The result is that a term of imprisonment may be imposed in some cases in which it would not be imposed if better alternatives were available. In other cases, a judge might impose a longer term than would ordinarily be appropriate simply because there were no available alternatives that served the purposes he sought to achieve with a long sentence. For example, maximum fines in current law are generally too small to provide punishment and deterrence to major offenders.[49] Frequently, a fine does not come close to the amount the defendant has gained by committing the offense. The statutes expressly suggest only a few possible conditions that may be placed upon a term of probation and do not provide specifically for alternatives to all or part of a prison term such as community service or brief intervals, such as evenings or weekends, in prison. Finally, current law makes no provision for notifying victims of a fraudulent offense of the conviction so that they may seek civil remedies.

SENTENCING PROVISIONS IN THE BILL

1. Comprehensiveness and consistency

S. 688 contains a comprehensive statement of the Federal law of sentencing. It outlines in one place the purposes of sentencing, describes in detail the kinds of sentences that may be imposed to carry out those purposes, and prescribes the factors that should be considered in determining the kind of sentence to impose in a particular case.

The bill gives congressional recognition to four purposes of sentencing: (1) the need to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment; (2) the need to afford adequate deterrence to criminal conduct; (3) the need to protect the public from further crimes of the defendant; and (4) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner.[50]

The bill specifies that an individual may be sentenced to a term of probation, a fine, or a term of imprisonment, or to a combination of a fine and probation or a combination of a fine and imprisonment.[51] An organization may be sentenced to a term of probation or a fine, or to a combination of these.[52] Either an individual or an organization may be ordered as a part of the sentence to forfeit any interest in a racketeering syndicate,[53] to give notice to victims of a fraudulent offense,[54] or to make restitution to the victim of an offense that causes bodily injury or death or that results in damage to or loss or destruction of property.[55]

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[49] There are a few exceptions in recently enacted provisions. See, e.g., 15 U.S.C. 1, 2, and 3.

[50] Proposed 18 U.S.C. 3553 (a)(2).

[51] Proposed 18 U.S.C. 3551(b).

[52] Proposed 18 U.S.C. 3551(c).

[53] Proposed 18 U.S.C. 3554.

S. 668 creates a grading scheme by which each offense can be ranked according to its relative seriousness.[56] This device is used to define the maximum term of imprisonment,[57] the maximum fine,[58] the maximum term of probation[59] and the maximum term of supervised release[60] for each grade of offense. The definition of maximum prison term does not alter existing statutory maximum: the existing Federal statutes still determine the maximum term of imprisonment.[61] The provision is intended merely to provide a useful scheme for future Congressional classification of criminal statutes. On the other hand, the proposed maximums for fines, probation, and supervised releases will supersede existing law when the bill is enacted into law.[62] The grading scheme in S. 668 can be used by the Sentencing Commission when it makes recommendations concerning legislative changes needed to improve Federal sentencing practices, and the Committee strongly encourages such recommendations.

The bill creates a sentencing guidelines system that is intended to treat all classes of offenses committed by all categories of offenders consistently.[63] This approach will eliminate specialized sentencing statutes that cover narrow classes of offenders and will thus eliminate the problem created by an offender whose case might fall into more than one category. The sentencing guidelines will recommend to the sentencing judge an appropriate kind and range of sentence for a given category of offense committed by a given category of offender. The guidelines will be supplemented by policy statements that will address questions concerning the appropriate use of the sanctions of criminal forfeiture, order of notice to victims, and order of restitution and the use of conditions of probation and post-release supervision. The formulation of sentencing guidelines and policy statements will provide an unprecedented opportunity in the Federal system to look at sentencing patterns as a whole to assure that the sentences imposed are consistent with the purposes of sentencing. At the same time, the use of sentencing guidelines and policy statements is intended to assure that each sentence is fair compared to all other sentences.

The sentencing guidelines system will not remove all of the judge's sentencing discretion. Instead, it will guide the judge in making his decision on the appropriate sentence. If the judge finds an aggravating or mitigating circumstance present in the case that was not adequately considered in the formulation of the guidelines and that should result in a sentence different from that recommended in the guidelines, the judge may sentence the defendant outside the guidelines.[64] A sentence that is above the guidelines may be appealed by the defendant; [65] a sentence below the guidelines may be appealed by the government.[66] The case law that is developed from these appeals may, in turn, be used to further refine the guidelines.

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[54] Proposed 18 U.S.C. 3555

[55] Proposed 18 U.S.C. 3556, which incorporates by reference 18 U.S.C. 3663 and 3664. Sections 3663 and 3664 were enacted as 18 U.S.C. 3579 and 3580 by section 5 of the Victim and Witness Protection Act of 1982, and would be renumbered as sections 3663 and 3664 by section 2(a) of this bill.

[56] See proposed 18 U.S.C. 3581(a).

[57] Proposed 18 U.S.C. 3581(b).

[58] Proposed 18 U.S.C. 3571(b).

[59] Proposed 18 U.S.C. 3561(b) and 18 U.S.C. 3563(a) and (b).

[60] Proposed 18 U.S.C. 3583.

[61] Proposed 18 U.S.C. 3559(b)(2).

[62] Proposed 18 U.S.C. 3559(b)(1). An exception is made when the maximum fine in current law is higher than that specified in title II of this bill; in that case, the current maximum would apply.

[63] See proposed 28 U.S.C. 991(b) and 994(a); proposed 18 U.S.C. 3553(b).

2. Assuring fairness in sentencing

A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity.[67] The bill requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing.[68] He is then to determine which sentencing guideline and policy statements apply to the case. Either he may decide that the guideline recommendation appropriately reflects the offense and offender characteristics and impose sentence according to the guideline recommendation or he may conclude that the guidelines fail to reflect adequately a pertinent aggravating or mitigating circumstance and impose sentence outside the guidelines.[69] A sentence outside the guidelines is appealable, with the appellate court directed to determine whether the sentence is reasonable.[70] Thus, the bill seeks to assure that most cases will result in sentences within the guidelines range and that sentences outside the guidelines will be imposed only in appropriate cases.[71]

The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences. Indeed, the use of sentencing guidelines will actually enhance the individualization of sentences as compared to current law.[72] Under a sentencing guidelines system, the judge is directed to impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender. This examination is made on the basis of a presentence report that notes the presence or absence of each relevant offense and offender characteristics. This will assure that the probation officer and the sentencing judge will be able to make informed comparisons between the case at hand and others of a similar nature.

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[64] Proposed 18 U.S.C. 3553(b).

[65] Proposed 18 U.S.C. 3742(a).

[66] Proposed 18 U.S.C. 3742(b).

[67] See proposed 28 U.S.C. 991(b)(2); proposed 18 U.S.C. 3553(a)(6).

[68] Proposed 18 U.S.C. 3553(a).

[69] Proposed 18 U.S.C. 3553(b).

[70] Proposed 18 U.S.C. 3742.

[71] The United States Parole Commission currently sets prison release dates outside its guidelines in about 20 percent of the cases in its jurisdiction. United States Parole Commission, *Report for October 1, 1978 to September 30, 1980,* Table III at 22 (1981). It is anticipated that judges will impose sentences outside the sentencing guidelines at about the same rate or possibly at a somewhat lower rate since the sentencing guidelines should contain recommendations of appropriate sentences for more detailed combinations of offense and offender characteristics than do the parole guidelines. See also National Academy of Sciences Report, *supra* note 45 at 29, which concludes that, "With voluntary guidelines, studies have found no evidence of systematic judicial compliance; with changes directly mandated by statute, as in the cases of mandatory and determinate sentencing laws [such as the California system of legislated sentences], studies have found formal (but not necessarily substantive) judicial compliance. However, under Minnesota's presumptive sentencing guidelines [which were promulgated under legislation substantially similar to this bill], the presence of effective external enforcement mechanisms, in the form of appellate review of sentences and close monitoring by the Guidelines Commission, has resulted in generally high rates of substantive compliance with guidelines by judges in that state."

The Parole Commission has argued that, even if a sentencing guidelines system is adopted, the Commission should be retained to set the actual release date for a person sentenced by a judge to a term of imprisonment.[73] Under its proposal, the judge, after considering the sentencing guidelines, would determine whether to send a defendant to prison and, if so, would set the maximum prison term that could be served by the defendant. Shortly after the defendant begins his term, the Parole Commission, using its own guidelines, would set a presumptive release date subject to good behavior and could later adjust that date for noncompliance with prison rules. It bases this belief on the argument that a small collegial body will be better able than the Federal judges to achieve the goal of elimination of unwarranted sentencing disparity. The Committee strongly disagrees with the Parole Commission. The proposal is based on the same discredited assumptions as the present system and is entirely at odds with the rationale of the proposed guidelines system.[74] Moreover, it has several practical de-

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[72] Recent studies indicate that sentences too often reflect the personal attitudes and practices of individual sentencing judges. Sentences also vary depending upon the availability of pertinent information regarding the offenses and offenders and upon the often inconsistent recommendations of probation officers. See National Academy of Sciences Report, *supra* note 45 at 44, citing Carter and Wilkins, "Some Factors in Sentencing Policy," 58 *J. Crim. Law, Criminology and Police Science* 503-514 (1967), and D. Townsend, Y. Avichai, and G. Peters, *Technical Issue Paper on Presentence Investigation Reports* (Report No. 3, Critical Issues in Adult Probation, Center for Law Enforcement and Correctional Justice, Westerville, Ohio, 1978).

[73] Subcommittee Criminal Code Hearings, Part XIII, at 9020-28.

[74] The Committee's view that parole should be abolished in the context of a completely restructured guidelines sentencing system is consistent with the general sentencing philosophy expressed by numerous commentators on the current sentencing process. See, e.g., P. O'Donnell, J. Churgin, and D. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* 13, 14, 28, 56 (New York 1977) (the study on which the sentencing provisions in S. 668 are largely based) ("* * * [O]ur decision to recommend a guideline approach for sentencing requires abolition of parole, at least as that process has been administered in the past"); Kennedy, *Toward a New System of Criminal Sentencing: Law With Order,* 16 Am. Cr. L. Rev. 353 (Spring 1979); Frankel, *Panel on Sentencing Provisions in the Proposed Federal Code,* 80 F.R.D. 151, 153 (1979); panel held December 28, 1977) ("Let the judges judge and be accountable. The idea of a parole board or commission serving in effect to review the judges was not sound when it was more or less covert; it does not improve as an express proposition."); Newman, *A Better Way to Sentence Criminals,* 63 A.B.A.J. 1563, 1566 (November 1977) ("By rating cases according to offense severity and offender backgrounds only and abandoning any pretense of being able to perform the impossible task of determining when a prisoner has been 'rehabilitated,' the parole commission has demonstrated abundantly that it can now go out of business."); Morris, *Toward Principled Sentencing,* 37 Md. L. Rev. 276 (1977); Skrivseth, *Abolishing Parole: Assuring Fairness and Certainty in Sentencing,* 7 Hofstra L. Rev. 281, 313 (1979), van den Haag, *Punitive Sentences,* 7 Hofstra L. Rev. 123, 135 (1978); Genego, Goldberger, and Jackson, *Parole Release Decisionmaking and the Sentencing Process,* 84 Yale L.J. 897 (March 1975) ("[T]he Parole Board can make no greater contribution than can the judiciary in fairly effectuating the goals of punishment or reducing the most serious sentencing disparity."); Pierce, *Rehabilitation in Corrections: A Reassessment,* 38 Fed. Probation 14-19 (1974); Fairbanks, *Parole—A Function of the Judiciary?* 27 Okla. L. Rev. 657 (1974) ("* * * [P]arole boards do not have information reasonably related to prediction, they have no apparent predictive skills, they are not even the putative experts, the entire business of predicting recidivism even by so-called experts is so dubious that it can hardly stand as a rationale for the discretionary release aspect of parole. * * * The case for the abolish-

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ficiencies that would result in continuing some of the unfairness and uncertainty in the current system.

First, it would perpetuate the current problem that judges do not control the determination of the length of a prison term even though this function is particularly judicial in nature.[75] The better view is that sentencing should be within the province of the judiciary. Indeed, it is arguable that the Parole Commission by basing its decision on factors already known at the time of sentencing, has already usurped a function of the judiciary.[76]

Second, the argument that the Parole Commission, because it is a "small collegial body," is able to render more consistent decisions than the Federal judges would be, is debatable. Initial decisions of the Parole Commission are made by at least 35 hearing examiners, not by the nine Commissioners. It seems unlikely that more than 40 people making administrative decisions would result in substantially less inconsistency than a few hundred people making judicial

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ment of parole is not as radical or as difficult as might first appear. Having shown parole to be ineffective, and not likely to improve; and having also shown that in terms of what parole actually does it is duplicative. * * *"; McAnany, Merritt and Tromanhauser, *Illinois Reconsiders Flat Time: An Analysis of the Impact of the Justice Model,* 52 Chicago-Kent L. Rev. 640 (1976); Stanley, *Prisoners Among Us: The Problem of Parole* 77–79 (Washington, D.C. 1976); N. Morris, *The Future of Imprisonment* (Chicago, 1974).

A number of witnesses at the Committee hearings on the proposed revision of the Federal Code also expressed a sentencing philosophy consistent with the abolition of parole in the context of comprehensive sentencing reform. See, e.g., Criminal Code Hearings, Part XVI, at 11765–66 (Statement of Attorney General William French Smith); pp. 11787–88 (Statement of former Attorney General Griffin B. Bell, Chairman of the Attorney General's Task Force on Violent Crime); Subcommittee Criminal Code Hearings, Part XIII, at pp. 8595–96 (Testimony of Attorney General Griffin B. Bell); pp. 9008–09 (Statement of Ronald L. Gainer); p. 8961 (Testimony of former Judge Harold Tyler: "[I]f the [Sentencing] Commission works well there would then be no need of parole commissions as we now know them * * *"); p. 8973 (Testimony of Judge Morris Lasker: "I do believe that history is showing that parole as an institution is an idea whose time may be past,"); p. 9127 (Statement of Kay Harris: "NMPC [the National Moratorium on Prison Construction] favors in principle the abolition of parole, but believes that parole abolition should not be attempted in isolation from other major criminal justice system changes * * * [W]e believe that the parole system is fatally flawed conceptually, based as it is on prediction of future individual conduct. Parole has often served to increase, rather than decrease, arbitrary and inequitable treatment of prisoners.")

The House Judiciary Subcommittee on Criminal Justice, in the course of its consideration of a revised Federal Criminal Code in the 96th Congress, also received testimony and letters in support of parole abolition. Former Judge Harold Tyler in his prepared statement presented to the Committee on October 11, 1979, stated that the proposal to retain the Parole Commission for five years under consideration by the Subcommittee, was "extremely unwise" for several reasons: first, "it will be impossible to understand or know whether judges in fact were sentencing an offender to the amount of time they actually intended or to twice the time they intended in anticipation that the Parole Commission would grant one-half parole"; second, there "is the likelihood that there would be confusion and unfairness to sentenced offenders and to the public at large"; third, "it seems to me that continuing the Parole Commission is really unnecessary in order * * * to deal with that occasional case where, in a determinate sentence scheme, an offender receives a sentence which turns out to be manifestly unfair or 'wrong', particularly in light of post-sentence developments" and that there are alternative methods for solving this problem. *Revision of the Federal Criminal Code,* Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 1911 [hereinafter cited as *House Hearings*]. See also *House Hearings, id.* at 1832 (Testimony of Norman Carlson); letter of Harvey A. Silverglate, a member of the Executive Board of the Massachusetts Chapter of the American Civil Liberties Union, to Congressman Robert F. Drinan, Chairman, Subcommittee on Criminal Justice, House Committee on the Judiciary, dated October 4, 1979, suggesting abolition of parole; and letter from Circuit Judge Jon O. Newman, United States Court of Appeals for the Second Circuit, to Congressman Drinan, dated September 14, 1979, opposing even the temporary retention of the Parole Commission in a sentencing guidelines system and suggesting possible "safety valves" in the unusual case in which one is needed. *House Hearings, id.* at 4539–43.

[75] See Subcommittee Criminal Code Hearings, Part XIII, at 9028–29 (Letter of Dorothy Parker, Commissioner of United States Parole Commission).

[76] Ibid. The Committee does not, however, agree with the suggestion by Mrs. Parker that the solution to this problem is to transfer the Parole Commission to the judicial branch; while implementation of that suggestion might resolve the theoretical problem caused by the Parole Commission's current position in the executive branch, it would not solve any of the other problems discussed here.

decision, after hearing arguments presented by counsel for both sides, which are subject to appellate review by eleven courts of appeals sitting in panels and, ultimately, by a single Supreme Court. The recent GAO study of the operations of the United States Parole Commission [77] concluded that the hearing examiners made errors in applying the guidelines in 53 percent of the cases studied, and most of these errors were not corrected in the internal appeals process.[78] GAO specifically found that one reason the appellate process did not result in correction of errors in application of the guidelines was a Parole Commission policy that barred a decision more adverse to the prisoner than the decision appealed, even if the early release date was the result of an erroneous application of the guidelines.[79]

Third, it would draw an artificial line between imprisonment and probation, forcing the sentencing guidelines system and the judges to formulate sentencing policy that assumes that a term of imprisonment, no matter how brief, is necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine. Such an assumption would be a roadblock to the development of sensible comprehensive sentencing policy.

Fourth, it would continue the current problem that actual terms of imprisonment are determined in private rather than public proceedings.

Fifth, the Parole Commission might be basing decisions on a different sentencing philosophy than is reflected in the sentencing guidelines. The Parole Commission has suggested that, at least for the first few years of sentencing guidelines, the Parole Commission should issue its own guidelines for lengths of prison terms rather than rely on guidelines promulgated by the Sentencing Commission.

Finally, under the Parole Commission's proposal the procedures for review of a sentence outside the guidelines—for example, when both a term of imprisonment and a fine outside the guidelines are imposed—would be virtually unworkable. Apparently, the fine level would be reviewed publicly in the courts of appeals while the term of imprisonment would be reviewed privately by the Parole Commission. It is even possible that the Parole Commission under its proposal would review and amend a sentence after a United States court of appeals had already found it to be reasonable—a situation that the Committee finds totally unacceptable.

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defender was convicted have been later amended to provide a shorter term of imprisonment. The Committee believes, however, that it is unnecessary to continue the expensive[80] and cumbersome Parole Commission to deal with the relatively small number of cases in which there may be justification for reducing a term of imprisonment. The bill, as reported, provides instead in proposed 18 U.S.C. 3583(c) for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described.

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[77] General Accounting Office, *Federal Parole Practices: Better Management and Legislative Changes Are Needed*, Report No. B-133223 (1982).

[78] *Id.* at ii, 11-56. The Parole Commission has criticized the methodology of the GAO study, particularly on the basis of its use of complex cases rather than a random sample of cases before the Commission. *Id.* at 187-90.

[79] *Id.* at 39, 75-76. The General Counsel of the Parole Commission has questioned the legality of a parole release decision based on an incorrect interpretation of the guidelines. *Id.* at 75-76.

3. Certainty in release date

Under the bill, the sentence imposed by the judge will be the sentence actually served. A sentence that exceeds one year may be adjusted at the end of each year by 36 days for a prisoner's compliance with institutional regulations. Should a prisoner demonstrate less than satisfactory compliance with prison rules, however, he may receive a small adjustment, or no adjustment at all.[81] Once this credit has been given by the Bureau of Prisons, it cannot be withdrawn. Nor may credit that has been denied later be granted. The prisoner, the public, and the corrections officials will be certain at all times how long the prison term will be, and of the consequences of causing institutional discipline problems.

The Parole Commission will have no jurisdiction over offenders sentenced under the guidelines sentencing system.[82] The Committee believes that, in a guidelines sentencing system, no useful purpose will be served by continuing the Commission. Prison sentences imposed will represent the actual time to be served and the prisoners and the public will know when offenders will be released from prison. Prisoner's morale will probably improve when the uncertainties about release dates are removed.[83] Public respect for the law will grow when the public knows that the judicially-imposed sentence announced in a particular case represents the real sentence, rather than one subject to constant adjustment by the Parole Commission.

The other purposes served in current law by the parole release mechanism will also be better achieved. First, as already discussed, the sentencing guidelines system is better able than the parole system to achieve fairness and certainty in sentencing.

Second, the bill requires that the judge decide, based on factors known at the time of sentencing, whether a defendant who is sentenced to a term of imprisonment will need post-release supervision and what the conditions of that release should be.[84] Under current law, a prisoner is placed on parole supervision if he is released more than 180 days before expiration of his sentence.[85] This does not assure that the prisoner who will need post-release supervision will receive it, nor does it prevent probation system resources from being wasted on supervisory services for releasees who do not need them.

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[80] The annual budget of the Parole Commission is about $7.8 million.

[81] Proposed 18 U.S.C. 3624(b).

[82] Under section 25(b) of the reported bill, the Parole Commission will remain in existence for 5 years after the sentencing guidelines go into effect to set release dates for prisoners sentenced before that date. At the end of that period, the Parole Commission will set final release dates for all prisoners still in its jurisdiction. In addition, section 26 of the bill requires the General Accounting Office, four years after the sentencing guidelines go into effect, to conduct a study, based in part on a report by the Sentencing Commission on the operation of the sentencing guidelines system. Congress would then evaluate the effectiveness of the guidelines system including a determination whether the parole system should be reinstated in some form.

[83] The official report on the Attica riots indicates that uncertainty in release dates was a major cause of the riots. New York Special Commission on Attica, *Attica* (1972), cited in von Hirsch, *Doing Justice: The Choice of Punishments*, at 31, n. 11. See also Subcommittee Criminal Code Hearings, Part XIII, at 8881.

[84] Proposed 18 U.S.C. 3584.

Third, because of the increased certainty of release dates, the bill should enhance prison rehabilitation efforts because prison officials will be able to work with prisoners to develop realistic work programs and goals within a set term of imprisonment. As Professor Norval Morris of the University of Chicago Law School has illustrated, parole boards are not able to predict with any degree of certainty which prisoners are likely to be "good" release risks and which are not.[86] Indeed, such determinations seem especially suspect when made on the basis of how a prisoner responds to prison rehabilitative programs.[87]

Fourth, the bill provides better mechanisms than the parole system for dealing with institution discipline problems. A prisoner will continue to receive credit toward his term, or "good time" for satisfactory institutional behavior,[88] but it will not be subject to constant adjustment by prison officials. Nor will an agency such as the Parole Commission be able to supersede the determination of prison officials regarding what effect disciplinary problems should have on the release date. If a prisoner is aware that his behavior will have a direct effect on his release date, he can set a personal goal for early release by demonstrating compliance with prison rules. Thus, prison discipline should improve greatly. It should be noted that prison officials now rely on a number of disciplinary measures, such as changing institutions or privileges, in addition to the current ineffective good time allowances, to effect good institutional behavior.[89]

Finally, under the bill, the Bureau of Prisons is required to assure, to the extent practicable, that the last ten percent of a prison term is spent "under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community." [90] The Bureau of Prisons has instituted an effective program in which transition services are made available to many prisoners while they are still serving their sentences. Thus, it is unnecessary to continue the parole system to carry out this purpose. In fact, under the current parole system, fewer than half the persons released after serving terms of imprisonment of more than one year are supervised. Thus, the parole system cannot be relied on for necessary transition services.

The Judicial Conference of the United States, while recommending a determinate sentencing guidelines system, has proposed legislation (S. 1182) that would retain the United States Parole Commission to continue some of its functions under current law. Under the

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[85] 18 U.S.C. 4164 and 4205.

[86] See, e.g., N. Morris, *The Future of Imprisonment*, pp. 31-34 (1974).

[87] Despite these conclusions of many in the corrections community, the Parole Commission, in determining a prisoner's release date, has recently placed increased emphasis on "superior program achievement." See 28 C.F.R. § 2.60.

[88] Proposed 18 U.S.C. 3624(b).

[89] See Subcommittee Criminal Code Hearings, Part XIII, at 9212-13.

[90] Proposed 18 U.S.C. 3624(c).

Judicial Conference proposal, the sentencing guidelines, in recommending a term of imprisonment, would recommend both a date for release on parole of a prisoner who substantially complies with prison rules and a maximum term of imprisonment that would be served. The sentencing judge, after considering the sentencing guidelines, would then specify both the parole release date, assuming good institutional behavior, and the maximum term that could be served by a particular prisoner if he did not meet that requirement. A prisoner would be released on his parole eligibility date unless the Parole Commission found at a hearing held shortly before that date that the prisoner had not "substantially observed the rules of the institution . . . to which he has been confined." If such a finding were made, the Parole Commission would set a release date, pursuant to its own guidelines, at a later date within the maximum sentence. The Parole Commission would also be responsible for setting release conditions for parolees, for revoking parole if the conditions were violated, and for re-paroling a prisoner whose parole was revoked.

The Committee has given this suggestion careful consideration but has rejected it on three grounds. First, the Parole Commission is a costly and cumbersome institution; and it is unlikely that the cost or complexity of the Commission would be reduced substantially if its function of setting release dates were eliminated. It would still have to hold at least one hearing in every case in which a defendant was sentenced to a term of imprisonment of more than one year; the purpose of the hearing would simply be changed. Second, the Judicial Conference proposal would not eliminate a significant problem with the current law; that is, a prisoner who needs post-release supervision may not receive it because he has served his entire term of imprisonment, while a prisoner who does not require supervision might be placed on parole merely because part of his term remains unserved when he is released.[91]

Third, the Judicial Conference proposal retains vestiges of the rehabilitation theory upon which current law is exclusively based. Under the proposal, prison release remains conditional until the defendant serves his full term of imprisonment in a combination of imprisonment and parole release. Only if the offender demonstrates that he is fully "rehabilitated" by complying with the terms of release will he have completed his prison term. Under the bill as reported, a prisoner has completed his prison term when released even if he is released to serve a term of supervised release. If he commits a technical violation of his release conditions, those conditions can be made more severe. If he commits a serious violation, he can, depending on the circumstances of the case, be punished for contempt of court or held pending trial if the violation is a new criminal offense.[92]

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[91] Under the Judicial Conference proposal, the sentencing guidelines (and a sentence imposed pursuant to them) could theoretically provide the same period for parole eligibility and for the maximum term of imprisonment, thus avoiding this problem in cases in which post-release supervision is unnecessary. However, it is unlikely that this was intended since it leaves no possibility of credit for good behavior for the category of prisoners most likely to earn it.

[92] Proposed 18 U.S.C. 3583 (e)(2) or (3).

4. *Availability of sentencing options*

The comprehensive sentencing provisions of the bill provide a full range of sentencing options. The Sentencing Commission in promulgating guidelines and the sentencing judge in imposing sentence may fashion a sentence that suits the characteristics of each offense and offender.

As noted earlier, the only type of sentence for which current law provides a full range of options is the term of imprisonment. This probably results in too much reliance on terms of imprisonment when other types of sentences would serve the purpose of sentencing equally well without the degree of restriction on liberty that results from imprisonment.[93]

Under the bill, maximum fines have been substantially increased from current law.[94] This will permit the imposition of a substantial fine in lieu of part or all of a prison term in appropriate cases.

The bill treats probation as a form of sentence with conditions[95] rather than as a deferral of imposition or execution of a sentence, and it requires that in felony cases it be accompanied by a fine, an order to pay restitution, or an order to engage in community service.[96] The Committee encourages the fashioning of conditions of probation in order to make probation a useful alternative to a term of imprisonment. A full range of possible probation conditions is suggested in the bill.[97] For example, the bill permits nights or weekends to be spent in a penal or correctional facility as a condition of probation. It continues the ability to require that the defendant reside at, or participate in a program of, a community correctional facility.

The bill adds a new sanction that may be imposed in addition to a term of probation, imprisonment, or a fine. It permits the judge to order that a defendant convicted of an offense of fraud or other intentionally deceptive practices give reasonable notice and explanation of the conviction to the victims of the offense so that they may seek appropriate civil redress.[98] In addition, it carries forward the newly created remedy of an order of restitution that permits the judge to order a defendant found guilty of an offense that caused bodily injury or property damage, destruction, or loss to make restitution to the victim.[99]

5. *Consistency of purpose*

For the first time, Federal law will assure that the Federal criminal justice system will adhere to a consistent sentencing philosophy. Further, each participant in the system will know what purpose is to be achieved by the sentence in each particular case.

As previously noted, the bill itself sets forth the four basic purposes of criminal sanctions.[100] It requires the Sentencing Commission to consider these purposes in developing sentencing guidelines and policy statements.[101] It further requires sentencing judges to consider them in imposing sentence.[102]

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[93] See, e.g., Remarks by Attorney General William French Smith, Vanderbilt University School of Law (Mar. 3, 1983); McCarthy, *Breaking Out of the Prison Mentality*, Wash. Post, Apr. 3, 1983, at K-9; *Crime and Punishment: Smith Seeks Reform*, L.A. Herald, Mar. 9, 1983, at A-8; *Jail Options Sought In Non-Violent Crime*, Ky. Enquirer, Mar. 4, 1983, at A-1.

[94] Proposed 18 U.S.C. 3571 (b).

[95] See proposed 18 U.S.C. 3551(b), 3551(c), 3561.

[96] Proposed 18 U.S.C. 3563(a)(2).

[97] See proposed 18 U.S.C. 3563.

[98] Proposed 18 U.S.C. 3555.

[99] Proposed 18 U.S.C. 3556.

[100] Proposed 18 U.S.C. 3553(a)(2).

The bill requires the sentencing judge to announce how the guidelines apply to each defendant [103] and to give his reasons for the sentence imposed.[104] The judge is also required to give the reason for imposing sentence at a particular point within the guidelines or, if the sentence is outside the guidelines, specific reasons for imposing a sentence of a different kind or length than recommended in the guidelines.[105]

The statement of reasons can be used by each participant in the Federal criminal justice system charged with reviewing or implementing a sentence. It will assist the appellate courts in reviewing the reasonableness of a sentence outside the guidelines, and in determining whether a sentence within the guidelines is the result of correct or incorrect application of the guidelines. The statement of reasons can be used by probation or prison officials, working in conjunction with the defendant, in achieving the goals sought by the sentencing judge.

Finally, the abolition of the Parole Commission will eliminate its second-guessing of the judge's sentencing, and will obviate the need for the judge to anticipate how the Parole Commission may alter the sentence he imposed.

6. Miscellaneous sentencing issues

a. Introduction

Since Federal sentencing reform legislation was first introduced more than six years ago, a number of concerns have been expressed. These include, in particular, concerns that the guideline sentences may be too high or too low; that they may result in prison overcrowding; that the guidelines system may shift discretion from the judges to the prosecutors; that the Sentencing Commission may have too much power; and that the authority for the Department of Justice to appeal a sentence below the guidelines is inappropriate

Since the time these sentencing proposals were first introduced in 1977 the Committee has suspected that these concerns were not well-founded. However, since 1977 a growing number of States and localities have implemented sentencing reform legislation or voluntary guidelines systems and preliminary indications based on their experiences support the workability of a sentencing guidelines system and, in particular, the advantages of the system proposed by the Committee as compared to other forms of sentencing reform.[106]

Following is a discussion of these issues and, where relevant, a description of State experience in the area.

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[101] Proposed 28 U.S.C. 991(b) and 994 (a) and (f).

[102] Proposed 18 U.S.C. 3553(a)(2).

[103] Proposed Rule 32(a)(1), F.R. Crim. P.

[104] Proposed 18 U.S.C. 3553(c).

[105] *Ibid.*

[106] See generally, National Academy of Sciences Report, *supra* note 45, which describes State and local sentencing reform efforts and discusses available research on the implementation of those reform efforts.

b. Guidelines sentences and impact on the criminal justice system

Some critics have expressed concern that sentences under the guidelines will be either too low to protect the public or so high that they will result in prison overcrowding.

In order to avoid these problems, the bill directs the Sentencing Commission both to ascertain current sentencing practice and to be mindful of the capacity of the prisons and other parts of the criminal justice system.[107] It should be made clear that these provisions are not designed to require the Sentencing Commission to recommend a continuation of current sentencing practices; they are included to assure that the Commission studies current practice sufficiently to avoid *inadvertent* changes in that practice. As the bill notes, "in many cases current sentences do not accurately reflect the seriousness of the offense." [108] The Committee is of the view that the Sentencing Commission will probably find, for example, that the sentences for some violent offenders are too low and that the sentences for some property offenders are too high to serve the purposes of sentencing. By developing complete information on current practices, the Sentencing Commission will be able, if necessary, to change those practices with a full awareness of their potential impact on the criminal justice system.

The bill also requires that the initial sentencing guidelines be submitted to the Congress six months before they go into effect, during which time the General Accounting Office is required to study the guidelines and compare their potential impact with the existing sentencing and parole system.[109] If, based on this information, the Congress concludes that the guidelines reflect sentences that are either too high or too low from either a practical or a philosophical standpoint, it can reject them by enacting the appropriate legislation.[110]

Several jurisdictions have recently adopted sentencing reform legislation or other sentencing reform measures. Only one State, Minnesota,[111] is operating under a determinate sentencing system with sentencing guidelines. One other State, Washington,[112] has enacted legislation to create a determinate sentencing guidelines system; Washington's guidelines are under development and are scheduled to go into effect in the middle of 1984. While several other States have enacted sentencing reform legislation in recent years, none of the other State sentencing systems is similar to the proposed Federal sentencing system in all important respects. The

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[107] Proposed 28 U.S.C. 994(g) and (*l*).

[108] Proposed 28 U.S.C. 994(*l*).

[109] Section 25(a)(1)(B)(ii) of S. 668.

[110] Proposed 28 U.S.C. 994(o).

[111] Minnesota Stat. Ann. §§ 244.04, 244.05, 244.08, 244.09, 244.10 (West Supp. 1983).

[112] Wash. Rev. Code Ann. §§ 9.94A.010 to 9.94A.260 (1983-1984 Supp.). (Unlike the Federal proposal and the Minnesota guidelines, the Washington guidelines are to be enacted by the legislature (see Wash. Rev. Code Ann. § 9.94A.070 (1983-1984 Supp.))

Pennsylvania,[113] California,[114] Illinois,[115] and Indiana [116] statutes, among others, create a determinate sentencing system but create a system of specific legislated sentences rather than a more flexible sentencing guidelines system. The Maine statute [117] abolishes parole but does not create either a sentencing guidelines system or legislated sentences. South Carolina has established a sentencing commission that is in the process of developing guidelines in the context of an indeterminate sentencing system.[118] Several States, including Maryland, Massachusetts, and New Jersey,[119] and numerous local courts have adopted such guidelines.[120]

The National Academy of Sciences has recently published an extensive study and evaluation of all the research that has been done on State and local sentencing reform efforts.[121] That study concluded that, in every respect studied, the Minnesota sentencing reform had been more successful than any other State or local reform effort in achieving its goals of reducing unwarranted sentencing disparity, increasing emphasis on punishment for violent offenders, and avoiding unintended burdens on the prison system.[122] This finding is especially important to the consideration of this bill because of the substantial similarity between the Minnesota legislation and this Federal sentencing reform measure.

The National Academy of Sciences study concluded that the Minnesota sentencing guidelines system was more successful in changing sentencing behavior to reduce unwarranted sentencing disparities for three reasons. First, the sentencing guidelines were required by legislation rather than adopted voluntarily by the courts. Second, the guidelines prescribed what sentencing behavior ought to be rather than merely describing past sentencing practices. And third, the Minnesota statute included a mechanism—availability of appellate review of all sentences outside the guidelines—to assure judicial compliance with the guidelines. The study also found that Minnesota was able to create a model of its criminal sentencing system that permitted it to test the impact of any given set of sentencing guidelines on its prison system, thus enabling it to fashion guidelines that avoided any unintended impact on the prison system.

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[113] 42 Pa. Cons. Stat. Ann. §§ 2151-2155, 2155 note, 9721, 9721 note (Purdon Supp. 1982-83). Pennsylvania law provides for rejection of sentencing guidelines by the General Assembly, *Id.* § 2155(b). The General Assembly adopted sentencing guidelines by statute in 1982, *Id.* § 9721 note. Both the Board of Probation and Parole and the Commission on Sentencing are scheduled to be abolished December 31, 1985, Pa. Cons. Stat. Ann. § 1795.6(b) (Purdon Supp. 1982-1983).

[114] Cal. Penal Code § 1170 (West Supp. 1983).

[115] Ill. Ann. Stat. ch. 38, §§ 1005-4-1, 1005-4-2, 1005-8-1, 1005-8-3, 1005-8-7, 1005-10-1, 1005-10-2 (Smith-Hurd 1982).

[116] See Ind. Code Ann. §§ 35-50-1A-7, 35-50-2-2(b), 35-50-2-3 to 35-50-3-4 (Burns 1979 and Burns Supp. 1982).

[117] Me. Rev. Stat. Ann. tit. 17-A, § 1252 (West Supp. 1982).

[118] § 24-27-10 et seq. (S.C. Code of Laws 1976).

[119] Administrative Office of the Courts, *Maryland Sentencing Guidelines Manual* (Rev. ed. October 1982); State of New Jersey, Administrative Office of the Courts, Sentencing Guidelines Project, *Report of the Sentencing Guidelines Project to the Administrative Director of the Courts.*

[120] See National Academy of Sciences Report, *supra* note 45 at 2, 61.

[121] National Academy of Sciences Report, *supra* note 45.

[122] *Id.* at 27, 29-31, 192-93, 253. See also Minnesota Sentencing Guidelines Commission, *Preliminary Report on the Development and Impact of the Minnesota Sentencing Guidelines (1982).*

c. Sentencing guidelines and prosecutorial discretion

Some critics expressed the concern that a sentencing guidelines system will simply shift discretion from sentencing judges to prosecutors.[123] The concern is that the prosecutor will use the plea bargaining process to circumvent the guidelines recommendation if he doesn't agree with the guidelines recommendation.

The bill contains a provision designed to avoid this possibility. Under proposed 28 U.S.C. 994(a)(2)(D), the Sentencing Commission is directed to issue policy statements for consideration by Federal judges in deciding whether to accept a plea agreement. This guidance will assure that judges can examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines. Professor Stephen J. Schulhofer, who initially raised the question of whether sentencing guidelines would shift too much discretion to prosecutors, has stated that judicial review of plea bargaining under such policy statements should alleviate any potential problem in this area.[124]

d. Makeup and authority of the Sentencing Commission

The bill as reported creates a United States Sentencing Commission whose duty is to promulgate sentencing guidelines and policy statements. The Sentencing Commission would be in the judicial branch and would consist of seven members appointed by the President with the advice and consent of the Senate. Two of the members would be active Federal judges.[125] The President would consult representatives of judges, prosecutors, defense attorneys, and others for recommendations on who should be members of the Commission.

The Chairman of the Commission would hold a full-time position and would be paid at the annual rate of judges of the United States Courts of Appeal. The other six positions would also be full-time until the end of the first six years that the guidelines are in effect. These positions would then become part-time. Individuals occupying full-time positions would be compensated at the rate of the judges of the United States Courts of Appeals. Part-time members would receive the daily rate at which United States Courts of Appeals judges are paid.[126]

The Judicial Conference of the United States, concerned that the Sentencing Commission would have too much power and would duplicate efforts of the staffs of the Federal Judicial Center and the Administrative Office of the United States Courts, has proposed alternative legislation (S. 1182). That bill specifies that sentencing guidelines would be issued by the Judicial Conference after considering guidelines recommended by a Committee on Sentencing of the Judicial Conference. The Committee on Sentencing would consist of seven part-time members selected by the Judicial Conference. Four of the members would be active Federal judges, while three other members would be persons who had never been judges and one of them would be a non-lawyer. Non-government members would be paid at the daily rate for GS–18 Federal employees. The proposed legislation contains no language concerning the staff of the Committee, but the supporting materials indicate that the staff would be provided by the Federal Judicial Center and the Administrative Office of the United States Courts.

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[123] See, e.g., Schulhofer, *Prosecutorial Discretion and Federal Sentencing Reform* 53–72 (1979); Criminal Code Hearings, part XIV, at 10101 (testimony of John Cleary).

[124] House hearings, *supra*, note 74 at 4621–24 (1979) (letter of Professor Stephen J. Schulhofer).

[125] 28 U.S.C. 991(a).

[126] 28 U.S.C. 992(c).

The Committee has given careful consideration to these recommendations of the Judicial Conference but has concluded that the provisions for a Sentencing Commission that are contained in S. 668 are preferable for a number of reasons.

First, the reported bill requires all three branches of government, rather than only the judicial branch, to participate in the selection of members of the Sentencing Commission. This permits legislative branch participation in the selection of members of the body to which Congress will be delegating some of its authority to set sentencing policy. Presidential appointment of the members assures high visibility of the Commission, which the Committee thinks is important to the Commission's role in guiding this extensive change in Federal sentencing policy. Finally, the bill does assure the judiciary a role in the selection of the members and does place the Commission in the judicial branch.

Second, the Judicial Conference bill would preclude membership on the guidelines drafting agency of former or senior Federal judges and of non-Federal judges. Since several judges in these categories have been among the most articulate spokesmen for sentencing reform, the Committee thinks it is undesirable to preclude them from consideration.

Third, the Committee thinks that the guidelines drafting agency should have full-time members at least until the initial guidelines are in place during its first few years. While the first set of guidelines is being drafted and implemented, the Commission members will be very busy studying current sentencing practices, determining the extent to which these practices should be changed or followed, and determining whether they need fine-tuning after they are implemented. In addition, because of the importance of the work of the Commission, that work should not be subordinated to other work of the members of the Commission.

Finally, the Committee strongly believes that the Sentencing Commission should have its own staff. Of course, that staff should coordinate with and draw on the expertise of the staffs of the Federal Judicial Center and the Administrative Office of the United States Courts, and the bill requires this coordination.[127] These staffs have highly competent personnel who have engaged in sentencing research, published sentencing data, and begun extensive data collection for assistance in implementing sentencing guidelines. It would be a mistake for the Sentencing Commission to fail to draw on these resources. However, the staffs of the Federal Judicial Center and the Administrative Office of the United States Courts have numerous other responsibilities; the Committee believes that it is important that there be a staff assigned only to sentencing reform responsibilities without conflicting demands on their time.

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[127] Proposed 28 U.S.C. 995(b).

e. Government appeal of sentence

Another frequent criticism leveled at the bill is that it should not provide the government with the power to appeal a sentence. If the reforms are to be effective in reducing unwarranted sentencing disparity and achieving overall fairness, however, it is essential that there be a mechanism to appeal on behalf of the public those sentences which fall below the applicable guidelines.[128] If the defendant alone can appeal, there will be no effective opportunity for the reviewing courts to correct an injustice arising from a sentence that is patently too lenient. Appellate review for the defendant alone would not be an effective weapon to fight disparity, since the appellate court could reduce excessive sentences but not raise inadequate ones. The effort to achieve greater uniformity, therefore, might unintentionally result in a gradual scaling down of sentences to the level of the more lenient ones.

CONCLUSION

The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.

The bill, as reported, meets the critical challenge of sentencing reform. The bill's sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain. The current effort constitutes an important attempt to reform the manner in which we sentence convicted offenders. The Committee believes that the bill represents a major breakthrough in this area.

SECTION-BY-SECTION ANALYSIS

Section 1 of the bill states that this title may be cited as the "Sentencing Reform Act of 1983".

Section 2(a)(1) redesignates a number of sections of title 18, United States Code, with new section numbers in order to preserve them while making room for the new sentencing provisions enacted by section 2(a)(2). Among the sections that are redesignated are 18 U.S.C. 3579 and 3580, the restitution provisions enacted by the Victim and Witness Protection Act of 1982, which are redesignated as 18 U.S.C. 3663 and 3664. All the redesignated provisions become part of new chapter 232 of title 18, United States Code, under section 2(a)(4) of the bill.

Section 2(a)(2) repeals the provisions of current chapters 227, 229, and 231 of title 18 that are not redesignated by section 2(a)(1) and replaces them with new chapters 227 and 229 of title 18. The repealed provisions are discussed below where pertinent.

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[128] The Committee rejects the argument that government appeal would be unconsitutional under the double jeopardy provision of the Constitution. See discussion with respect proposed 18 U.S.C. 3742 (Review of a sentence).

CHAPTER 227—SENTENCES

Proposed chapter 227 of title 18, United States Code, describes the types of sentences that can be imposed on Federal criminal offenders. Subchapter A contains general provisions relating to sentences for Federal offenses. Subchapters B, C, and D describe the sentences to a term of probation, to pay a fine, and to a term of imprisonment, respectively.

SUBCHAPTER A—GENERAL PROVISIONS

(Proposed 18 U.S.C. 3551-3559)

This subchapter contains general provisions relating to the types of sentences that can be imposed on individuals and on organizations, and to the considerations that should go into the determination of an appropriate sentence. Section 3551 lists the types of sentences that may be imposed upon a defendant who has been found guilty of an offense. Section 3552 contains the requirements for presentence investigations and reports. Section 3553 lists the factors to be considered by a sentencing judge in imposing sentence and sets forth the requirement that the judge state reasons for a particular sentence. Sections 3554 through 3556 describe the collateral sentences of an order of criminal forfeiture, an order of notice to victims of a fraudulent offense, and an order of restitution. Sections 3557 and 3558 contain cross-references to other provisions of title 18 and the Federal Rules of Appellate Procedure relating to appellate review and implementation of sentences. Section 3559 specifies how the classification system created in section 3581(b) applies to offenses that are not specifically graded by letter grade.

SECTION 3551. AUTHORIZED SENTENCES

1. In general

Section 3551 outlines the authorized sentences for defendants found guilty of Federal offenses. It requires that each Federal offender be sentenced in accord with the provisions of the subchapter in order to achieve the general purposes of sentencing. It lists separately the kinds of sentences that may be imposed on individuals and on organizations and the combinations of kinds of sentences that may be imposed.

2. Present Federal law

Section 3551 has no direct counterpart in current law. Generally each statute in current law that defines a criminal offense specifies the maximum term of imprisonment or the maximum fine, or both, that may be imposed upon a defendant found guilty of violating the statute. A few statutes also specify minimum sentences that must be imposed.[129] Current law also rarely distinguishes between individuals and organizations for sentencing purposes. Thus, present law fails to recognize the usual differences in the financial resources of these two categories of defendants and fails to take into account the greater financial harm to victims and the greater financial gain to the criminal that characterize offenses typically perpetrated by organizations.

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[129] Most statutes that specify minimum sentences do not create mandatory minimum sentences of confinement, since they do not preclude the suspension of sentence, or the placement of the defendant on probation or parole. Compare the apparent mandatory minimum sentence applicable to a first offense under 18 U.S.C. 924(c) with the mandatory minimum sentence applicable to a second offense under the same provision.

Nor does current law adduce the types of sentences that may be imposed on a particular type of defendant. The present statutes contain only general provisions for suspending the imposition or execution of most sentences and for placing defendants on probation rather than imposing or executing their sentences.[130]

Finally, current Federal law contains no general statement of the need for a sentence to carry out a particular purpose. It does, however, contain several very specialized sentencing statutes that apply only to certain categories of offenders—youth offenders,[131] young adult offenders,[132] certain drug users and addicts,[133] dangerous special offenders,[134] and dangerous special drug offenders [135]—and that tie their provisions to congressional statements that the purpose of the sentence is treatment,[136] treatment and supervision,[137] or incapacitation.[138]

3. Provisions of the bill, as reported

Subsection (a) provides that a defendant found guilty of any Federal offense shall be sentenced in accordance with the provisions of the chapter "so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case." The paragraphs referred to set forth the basic purposes of sentencing—deterrence,[139] incapacitation, just punishment, and rehabilitation. This part of section 3551 is designed to focus the sentencing process upon the objectives to be achieved by the Federal criminal justice system and to encourage the employment of sentencing options, such as probation, fines, imprisonment, or combinations thereof, in a fashion tailored to achieve these multiple objectives.

While the bill, as reported, contains a congressional statement of four purposes of sentencing, the Committee has not favored one purpose of sentencing over another except where the sentence involves a term of imprisonment.[140] While some of those who have commented on the bill prefer that one purpose or another be favored over the others or, indeed, that some of the listed purposes be deleted from the bill altogether,[141] the Committee believes that each of the four stated purposes should be considered in imposing sentence in a particular case. The Committee also recognizes that one purpose may have more bearing on the imposition of sentence in a particular case than another purpose has. For example, the purpose of rehabilitation may play an important role in sentencing an offender to a term of probation with the condition that he participate in a particular course of study, while the purposes of just punishment and incapacitation may be important considerations in sentencing a repeated or violent offender to a relatively long term of imprisonment.

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[130] 18 U.S.C. 3651.

[131] Federal Youth Corrections Act, chapter 402 of title 18, United States Code.

[132] 18 U.S.C. 4216.

[133] 18 U.S.C. 4251 *et seq.*

[134] 18 U.S.C. 3575 *et seq.*

[135] 21 U.S.C. 849.

[136] E.g., 18 U.S.C. 4216 (young adult offenders) and 4253 (certain drug users and addicts).

[137] 18 U.S.C. 5010 (b) and (c).

[138] See P.L. 91-452, 84 Stat. 922-23 (Organized Crime Control Act) (Oct. 15, 1970); 18 U.S.C. 3775-78; S. Rept. No. 91-617 at 83 (1969); see also 21 U.S.C. 849(f).

[139] The subject of general deterrence as a basis for imprisonment was discussed in *United States* v. *Foss*, 501 F. 2d 522 (1st Cir. 1974).

[140] Section 3582(a) provides, however, in light of current knowledge that in determining whether to impose a sentence of imprisonment and in determining the length of a term of imprisonment, the sentencing judge should recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation." Proposed section 994(k) of title 28, as enacted by section 7(a) of the bill, provides that the sentencing guidelines should reflect the "inappropriateness" of using rehabilitation or availability of corrections programs as the basis for imposing a term of imprisonment.

Subsection (b) of section 3551 specifies that an individual offender must either be placed on probation, fined, or imprisoned as provided in the subchapters governing the imposition of such sentences. It requires the imposition of at least one of such sentences.[142] It further states that a fine or any of the sanctions authorized by section 3554, 3555, or 3556 may be imposed in addition to any other sentence.

Subsection (b) treats a term of probation as a type of sentence, rather than as an alternative to imposition or execution of a sentence as in current law.[143] Subsection (b) also eliminates the split sentence in which a term of imprisonment is followed by a term of probation.[144]

Subsection (c) requires that an organization that is convicted of a Federal offense be sentenced to a term of probation [145] or to pay a fine, or both. At least one of such sentences must be imposed. In addition, an organization may, in an appropriate case, be made subject to an order of criminal forfeiture, an order of notice to victims, or an order of restitution.

S. 1, as introduced in the 93rd Congress, provided, as an equivalent to a term of imprisonment for an individual offender, that an organization could be barred from its "right to affect interstate or foreign commerce" for a period up to the maximum length of time that an individual convicted of an offense of the same seriousness could be sentenced to prison.[146] Because the Committee was concerned that such a provision might too readily be used in an inappropriate case, this provision was deleted in the reported version of S. 1437 in the 95th Congress.[147] Instead, S. 1437 took the approach that, in an appropriate case, an organization could be barred, as a condition of probation, from engaging in a particular business or could be ordered to engage in such a business only under stated circumstances.[148] Such a condition of probation would, of course, apply only for the duration of the term of probation.

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[141] See, e.g., Crime Control Act Hearings (testimony on May 23, 1983); Subcommittee Criminal Code Hearings, Part XIII, at 8582, 8590, 8874, 8883; Criminal Code Hearings, Part XVI, at 11957 and 11962.

[142] The National Commission's recommendation that there be an alternative sentence of "unconditional discharge" (Final Report §§ 3301, 3105) has not been adopted by the Committee. It seems to the Committee that it is both illogical and unwise to convict a defendant of a criminal offense without imposing any sanction for that misconduct. In a compelling case, a similar result can be achieved by imposing a sentenced to a term of probation without supervision. See sections 2101(b) and 2103.

[143] 18 U.S.C. 3651. See discussion of subchapter B of this chapter.

[144] But see proposed 18 U.S.C. 3563(b)(11) and 3583.

[145] A corporation may be placed on probation under current law. See, e.g., *United States* v. *Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972); *United States* v. *J.C. Ehrlich Co., Inc.* 372 F. Supp. 768 (D. Md. 1974).

[146] Section 1-4A1(c)(1).

[147] See S. Rept. No. 95-605, at 887 (1977).

Business groups, however, continued to express concern that the probation condition prohibiting an organization from engaging in a particular business might encourage misapplication to a business that had committed a regulatory offense but that was otherwise a legitimate business. While the intent of the Committee had been that the condition barring the conducting of a particular business shall be used only for an organization that conducted business in a flagrantly illegal manner, the Committee understands the concerns of business that the condition might encourage misapplication to the economic detriment of a legitimate enterprise. The Committee also believes that the situation in which an organization operates in a totally illegal manner is relatively unusual, occurring most frequently in cases where a business exists only as a front for those individuals who use it for their own fraudulent purposes. Accordingly, this condition of probation has been further modified by the Committee. The bill now provides that the condition prohibiting a defendant from engaging in a particular business shall apply only to an individual offender. In the rare case in which an organization operates in a generally illegal manner, the sentencing judge can rely on section 3563(b)(20), the general authority to set appropriate conditions of probation for the organization, and under section 3563(b)(6) can also bar an individual offender, such as an officer or even sole proprietor of a fraudulent business, from engaging in a particular business.

The Committee believes that section 3551 provides the basis for achieving considerable flexibility in the formulation of an appropriate sentence for each particular case. The combination of this section, the more detailed description of sentences that appears in the following subchapters, the purposes of sentencing set forth in section 3553(a)(2), and the provisions for sentencing guidance to the judges set forth in section 3553 of this title and in proposed chapter 58 of title 28,[149] should permit enough flexibility to individualize sentences according to the characteristics of the offense and the offender, while at the same time resulting in the imposition of sentences that treat offenders consistently and fairly.

SECTION 3552—PRESENTENCE REPORTS

1. In general

Section 3552 requires the preparation of a presentence report by a probation officer in accord with the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, permits the court to request a presentence report by the Bureau of Prisons or by psychiatric examiners in appropriate cases, and requires the court to assure that these presentence reports are made available in a timely manner to the defendant and his counsel and to the attorney for the government in accord with, and to the extent permitted by, the provisions of Rule 32(c).

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[148] See S. 1437, 95th Cong., 1st Sess., proposed 18 U.S.C. 2103(b)(6).

[149] See section 7 of the reported bill.

2. Present Federal law

The basic provisions dealing with presentence reports are currently found in Rule 32(c) of the Federal Rules of Criminal Procedure. Subdivision (c)(1) of Rule 32 requires that a presentence report be made unless (1) the defendant, with the permission of the court, waives it, or (2) the court finds that the record contains sufficient information and explains this finding on the record. The probation service is given wide discretion in determining the information to be included in the report.[150] The rule specifically mentions the prior criminal record of the defendant, the circumstances of the offense and those affecting the defendant's behavior, and information concerning restitution needs.[151]

The form used for the presentence reports is recommended by the Probation Division of the Administrative Office of the United States Courts.[152] Since July 1, 1978, as a result of those recommendations, Federal judges have received information in the presentence report regarding the parole guideline that the probation officer believes the Parole Commission will apply to the defendant if he is sentenced to a term of imprisonment,[153] and information concerning sentencing practices for the offense. This information shows the types and ranges of sentences imposed nationwide and in the judge's district for the type of offense (such as drug offenses) and shows the average number of months of imprisonment or probation those offenders received. The information does not include offense or offender characteristics, but the Administrative Office of the United States Courts is expanding its data collection in order to provide more detailed information. The judges also have available to them the *Sentences Imposed Chart* which shows all the sentences imposed in Federal court under each provision of Federal criminal law.

18 U.S.C. 4205(c) provides that the district court may commit a convicted offender to the care of the Bureau of Prisons for a more detailed study and analysis. The commitment is deemed to be for the maximum term of imprisonment prescribed by law. The results of the study must be reported to the court within three months, unless the court grants additional time, not to exceed three months, for further study. The court is then required to place the defendant on probation, affirm the maximum sentence already imposed, or reduce the sentence. Under 18 U.S.C. 4205(d), the report may include information "regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be pertinent." The provision does not prescribe who should conduct a mental health examination.

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[150] *United States* v. *Tucker*, 404 U.S. 443 (1972).

[151] Fed. R. Crim. P. 32(c)(2), as amended by section 3 of the Victim and Witness Protection Act of 1982, 96 Stat. 1248, 1249. See S. Rept. No. 97-532 at 11-14 (1982).

[152] The Presentence Investigation Report, Division of Probation, Administrative Office of the United States Courts (1976).

[153] The determination of the applicable guideline made by the probation officer is, of course, not binding on the Parole Commission, which can, and frequently does, determine that a different guideline applies.

3. Provisions of the bill, as reported

Section 3552 amends current law to assure that presentence reports contain the information necessary to make an appropriate sentencing decision in the new sentencing guidelines system. Under subsection (a), presentence reports are required to be prepared by probation officers pursuant to the provisions of Rule 32. Rule 32(c) is amended by the bill to require the preparation of a presentence report unless the judge finds that he has sufficient information "to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553". The defendant would not be able to waive the presentence report, as he can under current law, since it is important that the sentencing judge assure himself that he has sufficient information from which to determine the applicable sentencing guideline.

Pursuant to the recommendations of the Judicial Conference Committee on the Administration of the Probation System,[154] the Committee deleted from the proposed 18 U.S.C. 2002 in S. 1437 as introduced in the 95th Congress, a predecessor to proposed 18 U.S.C. 3552 in the reported bill, language that would have required conviction of a defendant before the presentence investigation could be conducted. Rule 32 of the Federal Rules of Criminal Procedure was amended in 1974 to authorize the making of a presentence investigation prior to conviction, provided only that the reports' contents may not be disclosed to anyone until conviction, except that a judge may inspect the presentence report with the written consent of the defendant. This section is intended to continue present law in this regard.

In its testimony in the 97th Congress, the Judicial Conference expressed concern that the provisions of subsection (a) as introduced could be construed to require that the probation officer who prepares the presentence investigation and report must be an officer of the particular court sentencing the defendant.[155] In accordance with a suggestion by the Conference, subsection (a) has been amended by the Committee to make clear that any probation officer may make the presentence investigation and report. This assures that, for example, if a defendant has lived in more than one district in which the investigation should be conducted, it is unnecessary for a probation officer of the sentencing court to travel to a distant district to complete the investigation; he can instead call on a probation officer of the distant district to conduct all or part of the investigation.

To assist the court in determining into what guideline category a case fits, and whether special mitigating or aggravating factors warrant the imposition of a sentence outside that guideline, the existing provisions of Rule 32(c)(2) (A) and (B) have been incorporated in subdivision (c)(2)(A) of the Rule and are amended by section 5(a)(5) of the bill, as reported, to refer generally to "the history and characteristics of the defendant" in conformity with the requirement of section 3553 that the judge consider these matters in imposing sentence. The Rule has been further amended to require that there be included in a presentence report:

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[154] Subcommittee Criminal Code Hearings, Part XIII, at 8940.

[155] Criminal Code Hearings, Part XVI, at 11021.

> the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances [as well as] any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2). * * *

The provisions of existing Rule 32(c)(2) (C) and (D) are carried forward unchanged as Rule 32(c)(2) (D) and (E).

Subsection (b) of section 3552 partially incorporates and revises the provisions of 18 U.S.C. 4205(c). The bill provides that if the court desires more information about a convicted defendant, either before or after receiving the presentence report and any report concerning the defendant's mental condition, it may order a study of the defendant. The study shall be conducted in the local community by qualified consultants unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau of Prisons or there are no adequate professional resources locally available to perform the study.

The provision that presentence studies be conducted locally where possible was added to maximize savings of time and money by reducing the need to transport Federal prisoners to distant Federal installations within the system and to avoid the practice of giving certain defendants a "taste of jail" under the pretense of sending them to a prison facility for the purpose of a pre-sentence examination. The bill amends current law by reducing the maximum period for the study from six months to 120 days (60 days plus a maximum 60-day extension) in order to advance the time for final sentencing while still allowing an adequate period for study. The Committee has amended the bill to specifically require that the court order for a study specify the information sought by the court. This will assure that those preparing the report will focus their attention on the issues of most interest to the court. The requirement is also consistent with the shortened period for preparation of the report. The preparers of the report are required to conduct a complete study of matters specified by the court and of any other matters they believe are pertinent to the factors that the judge must consider pursuant to section 3553(a) before imposing sentence. Before expiration of the study period or any extension, the study must be reported to the court. The report may contain any information that the Bureau believes to be pertinent to the sentencing decision. The report is required to include the Bureau's recommendations as to the sentencing guidelines and policy statements issued by the Sentencing Commission pursuant to 28 U.S.C.

994(a) that the preparers believe to be applicable to the defendant's case.

Under current law,[156] if a defendant is committed to the custody of the Bureau of Prisons for study prior to sentencing, he is deemed to have been sentenced to the maximum term of imprisonment for his offense. After the study, the judge either affirms that sentence, reduces it, or places the defendant on probation. Under subsection (b), the temporary sentence is expressly labelled for administrative purposes as a provisional sentence, and when the study is completed, the judge will impose a final sentence[157] under the various sentencing alternatives and procedures available under the chapter. Thus, the judge will be making the sentencing decision after all the necessary information has been obtained rather than being required to adjust a sentence that has already been set at the maximum level.

Earlier versions of this provision required the Bureau of Prisons to return the defendant to court following the presentence study. The current bill places this responsibility with the United States Marshals, since no change in this current practice was intended.

Subsection (c) adds a new provision to the law that specifically permits the court to order a presentence examination by a psychiatric examiner concerning the current mental condition of the defendant. The examination would be conducted by a licensed or certified psychiatrist or clinical psychologist designated by the court. The court would have the authority to designate more than one examiner if it found this to be appropriate. The court would be provided with a written report that included the defendant's history and present symptoms, a description of the psychiatric, psychological, and medical tests used and their results, the examiner's findings and prognosis, and any recommendation the examiner may have on how the defendant's mental health should affect his sentence. The examination would be conducted on an outpatient basis unless the defendant was incarcerated pending sentencing, and the judge could request the examination without a motion by prosecution or defense. The judge could order an examination under this section if he thought the defendant's mental condition might affect the sentencing decision. For example, a judge might believe that a convicted defendant's emotional problems should be considered in fashioning an appropriate sentence, and wish to seek the advice of a psychiatric examiner as to whether it would be more appropriate to deal with them in a prison setting or on an outpatient basis following a brief prison term.

A new subsection (d) was added by the Committee in the 96th Congress[158] and amended in this Congress to require that the judge assure that the reports prepared pursuant to this section are disclosed to the defendant, his counsel, and the attorney for the government at least 10 days prior to the date set for sentencing. The 10 day minimum disclosure period may be waived by the defendant.

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[156] 18 U.S.C. 4205(c).
[157] See proposed 18 U.S.C. 3562(b), 3573(c), and 3582(b) concerning degree of finality.
[158] See S. 1722, 96th Cong., 1st Sess., § 101, proposed 18 U.S.C. 2002(d), as reported.

The 10 day minimum for disclosure of the presentence report was added by Senator Kennedy in response to concerns raised by the defense bar that the practice concerning availability of presentence reports varies significantly from district to district, and even within districts. Under a sentencing guidelines system, the presentence report is a critical factor in sentencing. It is extremely important that the report be accurate and complete. Disclosure to both the government and defense counsel well in advance of the hearing will provide an opportunity to correct any deficiencies in the report before the sentencing hearing.

The disclosure is to be made pursuant to the provisions of Rule 32 of the Federal Rules of Criminal Procedure. Thus, disclosure may be in the form of an oral or written summary by the judge of portions of these reports if the judge finds pursuant to Rule 32(c)(3) that the report contains "diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons." The Committee believes that timely reports to the parties of the information on which the judge will base his sentencing decision are important to assure that counsel are prepared to address hearing questions relating to the appropriate application of the sentencing guidelines to the defendant. Section 5(a)(6) of the bill amends Rule 32(c)(3)(A) to require disclosure of the information required in the presentence report under Rule 32(c)(2) but to preclude disclosure of the actual sentence recommendation of the probation officer preparing the report.

The provisions of section 3552 thus will provide a court with the resources necessary to acquire adequate information about a convicted offender, including recommendations from the probation system and, if the judge believes it would be helpful, from the Bureau of Prisons or a psychiatric examiner, in order to assure a sound basis in fact for the sentencing decision. The section also assures that the defendant and the government have sufficient information concerning the basis for a sentencing decision to enable them to prepare for the sentencing hearing.

SECTION 3553. IMPOSITION OF A SENTENCE

1. In general

Section 3553 lists the factors that a judge should consider in imposing sentence. It requires the court to impose sentence within the sentencing guidelines unless an aggravating or mitigating circumstance exists that was not adequately considered in the formulation of the guidelines and that should result in a different sentence. It requires that a sentencing judge state reasons for the sentence imposed. Finally, it contains special provisions concerning presentence procedures to be followed if the court is considering imposition of an order of notice pursuant to section 3555.

2. Present Federal law

One of the most glaring defects in current sentencing law is the absence of general legislative guidance concerning the factors to be considered in imposing sentence.[159] This defect is aggravated by the fact that the sentencing judge is not required to state his reasons for imposing a particular sentence.[160] Each judge is left to formulate his own ideas about the factors to be considered in imposing sentence and the effect that each factor should have on the sentence imposed. The result is unwarranted disparities among sentences imposed by different judges.[161]

3. Provisions of the bill, as reported

Subsection (a) sets out the factors a judge is required to consider in selecting the sentence to be imposed in a particular case. This applies to both the appropriate type of sentence (e.g., fine, probation, imprisonment, or a combination thereof) and to the severity of the sentence.

Subsection (a)(1) directs the judge to consider the "nature and circumstances of the offense and the history and characteristics of the defendant." Under this provision, the judge must consider such things as the amount of harm done by the offense, whether a weapon was carried or used, whether the defendant was a lone participant in the offense or participated with others in a major or minor way, and whether there were any particular aggravating or mitigating circumstances surrounding the offense. With respect to the history and characteristics of the defendant, the judge must consider such matters as the criminal history of the defendant, as well as the nature and effect of any previous criminal sanctions. All of these considerations and others that the judge believed to be appropriate would assist him in assessing how the sentencing guidelines and policy statements should apply to the defendant. They would also help the judge to determine whether there were circumstances or factors that were not taken into account in the sentencing guidelines and that call for the imposition of a sentence outside the applicable guideline.

Subsection (a)(2) requires the judge to consider the four purposes of sentencing before imposing a particular sentence.

The first purpose listed is the need for the sentence "to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense."[162] This purpose—essentially the "just deserts" concept—should be reflected clearly in all sentences; it is another way of saying that the sentence shoud reflect the gravity of the defendant's conduct. From the public's standpoint, the sentence should be of a type and length that will adequately reflect, among other things, the harm done or threatened by the offense, and the public interest in preventing a recurrence of the offense. From the defendant's standpoint the sentence should not be unreasonably harsh under all the circumstances of the case and should not differ substantially from the sentence given to another similarly situated defendants convicted of a similar offense under similar circumstances.[163]

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[159] As discussed in connection with section 3551, a number of sentencing statutes applicable to specialized categories of offenders offer limited legislative guidance as to the purpose of a sentence under the specialized statute.

[160] See M. Frankel, *Criminal Sentences, Law Without Order*, 39-49 (1972).

[161] Federal Sentencing Study, *supra* note 18 at III-1 to III-9 (1981); A. Partridge and W. Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges* (1974), excerpts in Subcommittee Criminal Code Hearings, Part XI, at 8101.

[162] It has been suggested that one aspect of this purpose of sentencing, "just deserts," should be the sole purpose of sentencing. See Testimony of Andrew von Hirsch, Subcommittee Criminal Code Hearings, Part XIII, at 8977-78 and 8982-83; von Hirsch, *Doing Justice: The Choice of Punishments* (1976). While the Committee obviously believes that a sentence should be "just" and that the punitive purpose is important, it also believes that it is consistent with that purpose to examine the other purposes of sentencing set forth in section 3553(a)(2) in determining the type and length of sentence to be imposed in a particular case. Rehabilitative considerations may call for a sentence to probation with appropriate conditions where a sentence to a term of imprisonment in other circumstances might be "just"; incapacitation for an extended period of an offender with a serious criminal history might be appropriate where such a long term would not be "just" if the offender's criminal record were not considered.

The second purpose of sentencing is to deter others from committing the offense. This is particularly important in the area of white collar crime. Major white collar criminals often are sentenced to small fines and little or no imprisonment. Unfortunately, this creates the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business.

The third purpose is to protect the public from further crimes of the defendant. This is particularly important for those offenders whose criminal histories show repeated serious violations of the law.

The fourth purpose is to provide rehabilitation. During the hearings concerning the revision of the Federal Criminal Code, arguments were advanced that rehabilitation should be eliminated completely as a purpose of sentencing. The Committee has rejected this view. Instead, the Committee has retained rehabilitation and corrections as an appropriate purpose of a sentence,[164] while recognizing, in light of current knowledge, that "imprisonment is not an appropriate means of promoting correction and rehabilitation".[165] It has also required that the Sentencing Commission "insure that the [sentencing] guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." [166]

Rehabilitation is a particularly important consideration in formulating conditions for persons placed on probation. Their participation in such programs as education or vocational training, or in treatment programs such as those for persons with emotional problems or drug or alcohol problems, might be made conditions of probation for rehabilitative purposes.

The Committee does not suggest that efforts to rehabilitate prisoners should be abandoned. Programs within the prison setting should be available and encouraged to enhance the possibility of rehabilitation.[167] Also, as noted previously, the purpose of rehabilitation is still important in determining whether a sanction other than a term of imprisonment is appropriate in a particular case.

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[163] See proposed section 994(b)(1)(B) of title 28, United States Code, as added by section 7(a) of the bill, as reported.

[164] Proposed 18 U.S.C. 3553(a)(2)(D).

[165] Proposed 18 U.S.C. 3582(a).

[166] Proposed 28 U.S.C. 994(k), as added by section 7(a) of the reported bill. It is understood, of course, that if the Commission finds that the primary purpose of sentencing in a particular kind of case should be deterrence or incapacitation, and that a secondary purpose should be rehabilitation, the recommended guideline sentence should be imprisonment if that is determined to be the best means of assuring such deterrence or incapacitation, notwithstanding the fact that such a sentence would not be the best means of providing rehabilitation. A balancing of competing interest is necessary.

[167] Crime Control Act Hearings (statement of the Department of Justice, p. 24); N. Carlson, *Prisons: A Scarce Resource*, 2 (April 15, 1983).

In setting out the four purposes of sentencing, the Committee has deliberately not shown a preference for one purpose of sentencing over another in the belief that different purposes may play greater or lesser roles in sentencing for different types of offenses committed by different types of defendants.[168] The Committee recognizes that a particular purpose of sentencing may play no role in a particular case. The intent of subsection (a)(2) is to recognize the four purposes that sentencing in general is designed to achieve, and to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case.

Subsection (a)(3) requires the judge to consider all sentencing possibilities. The Committee added this provision to the sentencing provisions in the Criminal Code in the 95th Congress. The provision was added in response to two concerns: (1) prison sentences are imposed in cases where equally effective sentences involving less restraint on liberty would serve the purposes of sentencing,[169] and (2) some major offenders, particularly white collar offenders and serious violent crime offenders, frequently do not receive sentences that reflect the seriousness of their offenses. In the former case, for example, it might be possible to fashion a sentence that requires a high fine and weekends in prison for several months instead of a longer period of incarceration. In the case of a major white collar offense, the judge might impose a sentence to a term of imprisonment and a fine proportionate to the gain to the offender instead of simply a low fine that amounted only to a cost of doing business. In the case of a serious violent offense, the judge might impose a higher prison term than is served today in order to punish and incapacitate the criminal.

Subsections (a)(4) and (a)(5) require that the sentencing judge consider the kinds of sentence and the sentencing range applicable to the category of offense committed by the category of offender under the sentencing guidelines issued pursuant to 28 U.S.C. 994(a) and under any applicable policy statements issued by the Sentencing Commission.

The guidelines and policy statements to be applied are those in effect at the time of sentencing. Use of guidelines and policy statements since revised would only create significant administrative difficulties. Moreover, it would be inconsistent with the philosophy embodied in this legislation, that the Sentencing Commission can and should continually revise its guidelines and policies to assure that they are the most sophisticated statements available and will most appropriately carry out the purposes of sentencing. 28 U.S.C. 991(b)(1)(C) and 995(a) contain specific statutory direction and authority for such continual refinement. To impose a sentence under outmoded guidelines would foster irrationality in sentencing and would be contrary to the goal of consistency in sentencing.[170] The practice of the Parole Commission has been to use the guidelines currently in effect, and this practice has generally withstood challenges that it violated the prohibition against ex post facto laws in Article I, Section 9 of the Constitution.[171] The Committee believes that the reasons given for upholding the Parole Commission practice are equally applicable to the sentencing guidelines: the statutory maximum sentence applicable for an offense is unchanged by an alteration in the guidelines. Instead, the guidelines are designed to structure the exercise of discretion in making decisions, primarily to accommodate increased knowledge as to how differences among offenses or offenders should affect sentences. The guidelines do not eliminate the discretion to set a release date outside the guidelines if there is a valid reason for doing so.

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[168] See discussion of proposed 18 U.S.C. 3551(a).

[169] See W. Smith, Remarks at the Vanderbilt Univ. School of Law 10-11 (Mar. 3, 1983); N. Carlson, *supra* note 167 at 8.

[170] See the discussion of 28 U.S.C. 991(b)(1)(B).

Subsection (a)(6) requires the judge to consider "the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct". A similar provision, proposed 28 U.S.C. 991(b)(1)(B), is directed to the Sentencing Commission. These provisions underline the major premise of the sentencing guidelines—the need to avoid unwarranted sentencing disparity. The subsection requires judges to avoid unwarranted disparity in applying the guidelines and particularly in deciding when it is desirable to sentence outside the guidelines.

The Committee considered and rejected a proposal by the American Bar Association to include a so-called "lockstep" procedure which would mandate consideration by the sentencing judge in ordered fashion of a series of several sentencing alternatives prior to sentencing an individual.

In the Committee's view, the "lockstep" procedure is superfluous and incompatible with a sentencing guidelines system. The bill already requires the judge to consider all available sentences, and is neutral on what sentence is most appropriate for a given offense. The guidelines and policy statements of the Sentencing Commission, not a mechanistic examination of alternative sentences which may not even be applicable to a particular case, should guide the sentencing judge.

Subsection (b) of proposed 18 U.S.C. 3553 was added to S. 1437 during the Senate debate in the 95th Congress.[172] It requires the sentencing judge to impose a sentence consistent with the sentencing guidelines unless he finds in the case an aggravating or mitigating circumstances that was not adequately considered in the formulation of the sentencing guidelines and that should result in a different sentence from that recommended in the guidelines.

At the same time the provision provides the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines. A particular kind of circumstance, for example, might not have been considered by the Sentencing Commission at all because of its rarity, or it might have been considered only in its usual form and not in the particularly extreme form present in a particular case. The provision recognizes, however, that even though the judge finds an aggravating or mitigating circumstance in the case that was not adequately considered in the formulation of guidelines, the judge might conclude that the circumstance does not justify a sentence outside the guidelines. Instead, he might conclude that a sentence at the upper end of the range in the guidelines for an aggravating circumstance, or at the lower end of the range for a mitigating circumstance, was more appropriate or that the circumstance should not affect the sentence at all.

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[171] *Portley* v. *Grossman*, 444 U.S. 1311 (Rehnquist, Circuit Justice, 1980); *Warren* v. *United States Parole Commission*, 659 F.2d 183, 193-97 (D.C. Cir. 1981), cert. denied, 455 U.S. 950; *Zeidman* v. *United States Parole Commission*, 593 F.2d 806 (7th Cir. 1979); *Rifai* v. *United States Parole Commission*, 586 F.2d 695 (9th Cir. 1978); *Ruip* v. *United States*, 555 F.2d 1331 (6th Cir. 1977); *Kreis* v. *Seigler* (No. 75-1543, M.D. Penn., Mar. 31, 1976). But see, e.g., *Geraghty* v. *United States Parole Commission*, 579 F.2d 238 (3d Cir. 1978), reversed and remanded on other grounds, 445 U.S. 388, and *United States* v. *Tully*, 521 F. Supp. 331 (D. N.J. 1981), in which concern is expressed that, if the amended parole guidelines are applied mechanically rather than on an individualized basis, there would be an *ex post facto* problem.

[172] 124 Cong. Rec. S. 289, January 23, 1978 (daily ed.).

The Committee rejected an amendment by Senator Mathias which would have expanded significantly the circumstances under which judges could depart from the sentencing guidelines in a particular case. The Mathias amendment would have permitted deviations from the guidelines whenever a judge determined that the characteristics of the offender or the circumstances of the offense warranted deviation, whether or not the Sentencing Commission had considered such offense and offender characteristics in the development of the sentencing guidelines.

The Committee resisted this attempt to make the sentencing guidelines more voluntary than mandatory, because of the poor record of States reported in the National Academy of Science Report which have experimented with "voluntary" guidelines. In his testimony before the Committee on the Comprehensive Crime Control Act of 1983 (S. 829), the District Attorney for Middlesex County, Massachusetts, Scott Harshbarger, noted that the voluntary guidelines in Massachusetts were completely ineffective in reducing sentencing disparities and imposing a rational order on criminal sentencing in the State, because judges generally did not follow them.

Subsection (c) contains a new requirement that the court give the reasons for the imposition of the sentence at the time of sentencing. It also requires, if the sentence is within the guidelines, the court to give the reason for imposing sentence at a particular point within the range. Further, if the sentence is not within the sentencing guidelines, the court must give the specific reason for imposing a sentence that differs from the guidelines. This requirement would essentially explain why the court felt the guidelines did not adequately take into account all the pertinent circumstances of the case at hand. If the sentencing court believed the case was an entirely typical one for the applicable guideline category, it would have no adequate justification for deviating from the recommended range. The need for consistency in sentences for similar offenders committing similar offenses should be sufficiently important to dissuade a judge from deviating from a clearly applicable guideline range. An offender should not receive more favorable or less favorable treatment because he happens to be sentenced by a particular judge. A judge who disagrees with a guideline may, of course, make his views known to the Sentencing Commission and may recommend such changes as he deems appropriate.

The statement of reasons is made in open court. The Committee does not intend that the statement of reasons for a sentence within the guidelines become a legal battleground for challenging the propriety of a particular sentence or the probation or institutional program in which the defendant is placed. In particular, the Committee does not intend a statement that one purpose of a particular sentence is to permit the defendant to participate in a rehabilitation program to be the basis of a defendant's challenge to participation in the program because it is allegedly ineffective. It is also important that the judge give general reasons for a sentence within the applicable guideline to inform the defendant and the public of the reasons why the offender is subject to that particular guideline and in order to guide probation officers and prison officials to develop a program to meet his needs.

The statement of reasons for a sentence outside the guidelines is especially important. Under proposed 18 U.S.C. 3742, a defendant may appeal a sentence above the applicable guidelines, and the government may appeal a sentence below the guidelines. If the appellate court finds that a sentence outside the guidelines is unreasonable, the case may be remanded to the trial court for resentencing or the sentence may be amended by the appellate court. The statement of reasons will play an important role in the evaluation of the reasonableness of the sentence. In fact, if the sentencing judge failed to give specific reasons for a sentence outside the guidelines, the appellate court would be justified in returning the case to the sentencing judge for such a statement.

Sentences within the guidelines are subject to appeal under proposed 18 U.S.C. 3742 on grounds of illegality or an incorrect application of the guidelines. As with sentences outside the guidelines, the statement of reasons may play a role in the appellate court's decision on the legality of sentences. The statement of reasons in cases claiming incorrect application of the guidelines will probably play only a minor role in the appellate process because the sentencing court will be deciding factual issues concerning offense and offender characteristics which might not be discussed in the statement of reasons.[173]

Regardless of the grounds for appeal, the statement of reasons should not be subjected to such legalistic analysis that will make judges reluctant to sentence outside the guidelines when it is appropriate or that will encourage judges to give reasons in a standardized manner.

The statement of reasons also informs the defendant and the public of the reasons for the sentence. It provides information to criminal justice researchers evaluating the effectiveness of various sentencing practices in achieving their stated purposes. Finally, it assists the Sentencing Commission in its continuous reexamination of its guidelines and policy statements.

The Committee added subsection (d) to S. 1722 in the 96th Congress to allay concerns of the business community that an order of notice to victims under section 3555 or an order of restitution under section 3556 might be imposed without adequate consideration by the court of the issues involved. The subsection requires the court to give prior notification to the defendant and the government that it is considering imposing such an order of notice as part of the sentence. The purpose of the notification is to enable the parties to prepare adequately for the sentencing hearing. The subsection also requires that the court, upon motion of the defendant or the government or on its own motion, (1) permit the parties to submit affidavits and written memoranda concerning matters relevant to the imposition of an order of notice or restitution, including identification of individual victims or classes of victims, valuation issues, and defenses that a defendant could assert in a civil action with respect to any victim; (2) afford counsel an opportunity to address in open court the issue of the appropriateness of such an order; and (3) include in its statement of reasons for the sentence specific reasons for imposing the order. The court may also, upon motion of either party or its own motion, employ additional procedures, including hearing the testimony of witnesses, that it concludes will not unduly complicate or prolong the sentencing process. The Committee does not intend that the procedure be used to resolve difficult issues; if the complexity would unduly complicate or prolong the sentencing process, the court should not consider imposing an order of notice that would have to rest upon a resolution of such complexity, although in some cases the court might find it possible and advisable to accept such facts as more readily can be resolved and use them as the basis for a more limited order of notice.

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[173] The government has the right under current law to seek correction of an illegal sentence by a writ of mandamus. See *United States* v. *Denson*, 588 F.2d 1112, 1127 (5th Cir. 1979). Such sentences will be appealable under proposed 18 U.S.C. 3742.

SECTION 3554. ORDER OF CRIMINAL FORFEITURE

1. In general

At common law, a person convicted of treason and certain other felonies automatically forfeited to the crown his personal goods and chattels.[174] Furthermore, when a person had been attainted[175] for an act of high treason[176] or outlawry,[177] all of his interests in real property held at the time of the offense or acquired since that time were forfeited to the crown. According to Blackstone, the rationale for criminal forfeiture was that:[178]

> [H]e who hath thus violated the fundamental principles of government, and broke his part of the original contract between king and people, hath abandoned his connection with society; and hath no longer any right to those advantages, which before belong to him purely as a member of the community; among which social advantages the right of transferring or transmitting property to others is one of the chief. Such forfeitures moreover, whereby his posterity must suffer as well as himself, will help to restrain a man,

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[174] *The Palmyra,* 25 U.S. (12 Wheat.) 1, 14 (1827) (opinion of Mr. Justice Story).

[175] Attainder was a legal declaration of a man's death which occurred as an inevitable consequence of the declaration of final sentencing for high treason or outlawry; once attainted a person could not act as a witness in court, make a will, convey property, or bring an action. 4 Blackstone, *Commentaries* 347 (New ed. 1813).

[176] High treason generally included killing the king, promoting revolt against the king, or counterfeiting the great seal. *Id.* at 66–75.

[177] Outlawry consisted of flight while accused of an offense. It was declared *in absentia* but was attaintable only in cases where treason had originally been charged. *Id.* at 353.

[178] *Id.* at 349.

> not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections.

While there is one indication that the concept of criminal forfeiture was used in the colonies, the First Congress by Act of April 20, 1790,[179] abolished forfeiture of estate and corruption of blood, including such punishment in cases of treason. From that time until 1970 there was no criminal forfeiture provision in the United States Code. In 1970, Congress passed Title IX of the Organized Crime Control Act and Title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970,[180] which reinstated the common law provision of criminal forfeiture in organized crime cases and major drug trafficking cases. The purpose for enacting these provisions was to give law enforcement authorities greater flexibility in their fight against organized crime. In addition to the traditional penalties of imprisonment and fines, this provision was intended to separate the leaders of organized crime from their sources of economic power.[181]

In any discussion of forfeiture statutes, it is important to distinguish between criminal forfeiture and civil forfeiture. Criminal forfeiture is part of the sentence imposed upon conviction for a particular crime. In this sense, the proceeding is in personam against the defendant. There is no additional proceeding required before the property is forfeited to the United States.[182] The forfeiture is automatic upon imposition of sentence. On the other hand, under those Federal statutes which provide for civil forfeiture, the forfeiture is not part of the sentence. Before property may be civilly forfeited, the United States Attorney must bring a separate *in rem* action against property which is declared to be unlawful or contraband under the statute, property which is used for an unlawful purpose, or property which is used in connection with the prohibited act or transaction. The concept of an *in rem* action is that the property is the offender and thus the action is brought against the property,[183] a concept that developed from the ancient Roman religious practice of deodands. According to this custom, when a person was accidentally killed the object that caused his death—the tree that fell on him, the horse that threw him, or the bull that gored him—was forfeited to the church.[184] Later, the crown replaced the church as the recipient of the forfeited object or its value and the proceeds were distributed for charitable purposes.[185] Today, examples of civil forfeiture provisions are those contained in the customs, narcotics, and revenue laws.

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[179] 1 Stat. 117.

[180] 18 U.S.C. 1963 and 21 U.S.C. 848(a)(2). The former provision was held constitutional in *United States* v. *Amato*, 367 F. Supp. 547 (S.D.N.Y. 1973).

[181] See S. Rept. No. 91-617, 81st Cong., 1st Sess. 79 (1970).

[182] Thus, 28 U.S.C. 2461(b), which provides that "[u]nless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty", is not applicable to cases coming under this section.

[183] *Calero-Toledo et al.* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

[184] Blackstone, *Commentaries* 306 (New ed. 1813); 3 Coke, *Institute*, 57–58 (1817 ed.).

[185] Holmes, *The Common Law* 25 (1938 ed.).

2. Provisions of the bill, as reported

Proposed 18 U.S.C. 3554 carries forward by cross-reference the provisions of 18 U.S.C. 1963, relating to criminal forfeiture in organized crime cases, and section 413 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 848), relating to criminal forfeiture in drug trafficking cases. The references are included here in order to assure that this chapter includes a complete description of sentencing options. Under proposed 18 U.S.C. 3551(b) and (c), an order of criminal forfeiture may be imposed on an individual or an organization in combination with any other form of sentence. Under proposed 28 U.S.C. 994(a)(2)(A), the United States Sentencing Commission is required to issue policy statements concerning the appropriate use of an order of criminal forfeiture.

SECTION 3555. ORDER OF NOTICE TO VICTIMS

1. In general

Proposed 18 U.S.C. 3555 is a new provision which allows a court to require a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices to give notice and explanation of the conviction to the victims of the offense.

2. Present Federal law

There are no provisions of current Federal law which require an offender to give notice of his conviction to his victims.[186] There is, however, an analogous concept contained in present statutes that requires motor vehicle and tire manufacturers to notify the Secretary of Transportation of defects in their products and that permit the Secretary to disclose defects to the public (15 U.S.C. 1402(d)). The extension of the concept to the area of criminal law was proposed by the National Commission on Reform of Federal Criminal Laws.[187]

3. Provisions of the bill, as reported

This section will permit a court to assure notification to the persons injured by a multiple victim offense involving fraud or other intentionally deceptive practices that the perpetrator of the offense has been adjudged criminally responsible. The provision should facilitate any private actions that may be warranted for recovery of losses. Without such a provision, many victims of major fraud schemes may not become aware of the fraud (for example, that the mining stock they purchased is counterfeit) until it is too late to seek legal redress, or may not be able to ascertain the perpetrator's current whereabouts (for example, a "fly-by-night" roofing operation). The provision should also serve to alert fraud victims to the advisability of other action on their part (for example, news of the worthlessness of a phony "cancer cure" may prompt a victim to visit a doctor in time for proper medical attention).

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[186] Under current law, a court could accomplish the same result as a condition of probation, but could not require such notice in more serious cases in which imprisonment, rather than probation, is warranted. Also, the Federal Trade Commission today has considerable latitude in formulating cease and desist orders pursuant to 15 U.S.C. 45, violation of which is a criminal offense, to require a party which has engaged in unfair methods of competition such as false advertising, to take affirmative steps to assure that the deception is prevented in the future. See, e.g., *Waltham Watch Company* v. *Federal Trade Commission*, 318 F.2d 28, 32 (7th Cir. 1963), citing *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470; *L. Heller & Son. Inc.* v. *Federal Trade Commission*, 191 F.2d 954 (7th Cir. 1951).

[187] National Commission Final Report, *supra* note 1, § 3007.

The provisions may be expected to result in an increase in individual actions and class actions for civil recovery, and should have the collateral effect of reducing the attractiveness of large-scale, profit-seeking, deceptive practices.[188] While the perpetrator of a fraud may be convicted upon the testimony of one or two victims, the vast majority of those who have suffered from his offenses are not as readily identifiable. Since their potential claims remain unsatisfied for want of knowledge as to the offender's criminal responsibility and whereabouts, and since current fine levels are rarely high enough to permit the court to reach more than a fraction of the defendant's realized profits, the defendant, after serving the relatively limited period of imprisonment that is ordinarily imposed upon white collar defendants, is often free to enjoy a substantial remainder of the profits of his criminal venture. In combination with the higher fines that may be imposed under the bill, this provision's prompting of a substantially increased likelihood of successful civil suits should materially decrease the incentive to engage in this kind of criminal operation.

The power of the court to designate the advertising areas and media in which notice is to be given, and to approve the form of the notice, avoids the possibility of the offender's making only token efforts to give notice. It is actual notice rather than constructive notice that is sought to be obtained. Thus, if the group injured is readily identifiable and small, notice by letters to individuals may be sufficent. If there are multiple unknown persons injured, as in the case of a major fraud, specified newspaper ads might be used. The power of the court to approve the form of notice will give the court the ability to assure that the notice is adequate to explain to persons wronged by the offense what the defendant has done. Incentive to abide by a court's order under this section is provided not only by the court's contempt power, but also by permitting the fulfillment of the order to be made an express condition of probation in those cases in which imprisonment is not also imposed[189] or an express condition of post-release supervision if such a term is imposed.[190]

Several changes in section 3553 from the version contained as section 2005 in S. 1437 of the 95th Congress were made by the Committee in the 96th Congress.[191] The changes were in response to the concern of the business community that the provision might be used in an inappropriate case, such as a technical violation of a regulatory requirement, with resulting injury to business and reputation not justified by the nature of the offense or the amount of harm done by it. The changes also reflect concerns that, even where notice might be appropriate, costs of giving notice might exceed costs that should reasonably be borne by the offender given the nature of the offense and the amount of harm done. Accordingly, the Committee has limited the nature of the offenses for which notice may be ordered to those offenses that involve fraud or other intentionally deceptive practices, regardless of whether the offense is committed by an individual or by an organization. The Committee has also amended the notice requirement to provide that the convicted offender may be ordered to give "reasonable" notice and explanation of the offense and to require that the judge shall consider, in determining whether to require notice, not only the factors set forth in section 3553(a), but also the cost of giving notice as it relates to the loss caused by the offense. In addition, the Committee has limited to $20,000 the amount of costs that the court may order the defendant to pay for such notice.[192]

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[188] See generally 16 Cr.L. Rptr. 2178-2183 (Nov. 1974) (transcript of interview with Judge Charles R. Renfrew of the United States District Court of the Northern District of California).

[189] See proposed 18 U.S.C. 3563(b)(4).

[190] See proposed 18 U.S.C. 3583(d).

[191] See proposed 18 U.S.C. 2005 in S. 1722, 96th Cong., 1st Sess., as reported.

These amendments are intended to assure that the order of notice requires only such publication as is reasonable under the circumstances of the case. In a major fraud case involving identifiable consumers defrauded of substantial amounts of money, the defendant might reasonably be expected to give individual notice. In a major fraud case involving hundreds or thousands of consumers, each of whom sustained minor losses, notice might more appropriately be given by publication in newspapers reaching the bulk of the persons defrauded instead of individual notice. The Committee does not intend that the section be used to order "corrective advertising" or to subject a defendant to public derision. Publication should not be required beyond that which is necessary to notify the victims of the defendant's conviction. Further, if identifying the victims is so complex an undertaking that it could unduly complicate or prolong the sentencing process, the court should not require that such notice be given other than to those victims who can more readily be identified. The procedures set forth in section 3553(d) should assist the court in determining whether notice should be ordered in those cases in which complex issues are not raised. The fact that notice was ordered or given is not intended to confer any legal right on any person, and the notice may include a caveat that it is merely informational and creates no legal rights.

Proposed 18 U.S.C. 3742 permits a defendant to appeal a sentence that includes an order of notice. Because of the potential harm to business and reputation, the execution of an order of notice should be stayed pending appeal unless the court finds that the appeal or petition for review of sentence is frivolous or taken for purposes of delay.

SECTION 3556. ORDER OF RESTITUTION

Proposed 18 U.S.C. 3556 carries forward by cross-reference the restitution provisions enacted as 18 U.S.C. 3579 and 3580 by section 5(a) of the Victim and Witness Protection Act of 1982, and redesignated as 18 U.S.C. 3663 and 3664 by section 2(a)(1) of the bill. The bill includes the reference here in order to complete the description of available criminal sentences, and to show how the order of restitution can be used in conjunction with other sentences. Thus, proposed 18 U.S.C. 355 (b) and (c) make clear that an order of restitution may be imposed in addition to any other kind of sentence. Proposed 28 U.S.C. 994(a)(2)(A) requires that the United States Sentencing Commission issue policy statements concerning the appropriate use of orders of restitution. Finally, proposed 18 U.S.C. 3563(a)(2) requires that, if a person convicted of a felony is sentenced to a term of probation, a condition of that probation must be that he pay a fine or restitution, or perform community service.

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[192] In certain cases where the execution of the order has not been stayed, any costs in excess of that amount might be assumed (or costs pending payment of the ordered amount might temporarily be assumed) by the government, if otherwise appropriate and authorized, especially in cases in which timely notice is important because of the fraud's risk to the health of the victims or because of the incipient running of the civil statute of limitations.

18 U.S.C. 3579(g), as enacted by section 5(a) of the Victim and Witness Protection Act of 1982 and redesignated as 18 U.S.C. 3663(g) by this bill, requires that if a defendant who is ordered to pay restitution is placed on probation, the payment of restitution is a condition of probation. Failure to satisfy this condition would be a violation subject to the provisions of proposed 18 U.S.C. 3565. An order of restitution may also be made a condition of a term of supervised release imposed to follow a term of imprisonment pursuant to proposed 18 U.S.C. 3583(d). Violations of such a condition of post-release supervision would be contempt of court.

SECTION 3557. REVIEW OF A SENTENCE

This section, which has no counterpart in current law, refers to the provisions in proposed 18 U.S.C. 3742, which define the circumstances and procedures for review of sentences imposed pursuant to proposed 18 U.S.C. 3551. The systematized guideline sentencing procedures introduced by this bill are designed to eliminate from Federal criminal law the plainly disproportionate sentence. The provisions for appellate judicial review of sentences in section 3742 are designed to reduce materially any remaining unwarranted disparities by giving the right to appeal a sentence outside the guidelines and by providing a mechanism to assure that sentences inside the guidelines are based on correct application of the guidelines.

SECTION 3558. IMPLEMENTATION OF A SENTENCE

This section simply calls attention to the provisions of proposed chapter 229 of title 18, which govern the implementation of sentences imposed pursuant to section 3551.

SECTION 3559. SENTENCING CLASSIFICATION OF OFFENSES

1. In general

Proposed 18 U.S.C. 3559 describes what letter grade in proposed 18 U.S.C. 3581 will apply to an offense for which no letter grade is otherwise specified. It also provides that the maximum fine is the fine authorized by proposed 18 U.S.C. 3571(b) or by the statute describing the offense, whichever is greater.

2. Present Federal law

There is no counterpart for this provision, since current law contains no systematic grading scheme for sentences.

3. Provisions of the bill, as reported

Proposed 18 U.S.C. 3559 did not appear in S. 1437 as passed by the Senate in the 95th Congress. That bill instead specified the applicable grade for each offense defined in title 18 and amended each section outside title 18 that described an offense to indicate the sentence grade that applied to the offense. In general those amendments specified that an offense outside title 18 had the grade for which the proposed Criminal Code specified a maximum term of imprisonment closest to that for the offense in current law.

The Committee has reexamined the desirability of amending current law in an attempt to conform sentencing provisions to the grading scheme of the bill, and has decided that a general provision such as section 3559 is preferable at this time. To amend each individual section implies that the Committee has given careful consideration to grading all existing offenses, when, in fact, this has not been the case. Instead, the Committee has postponed the restructuring of Federal offenses according to their relative seriousness. The Sentencing Commission will undoubtedly have recommendations concerning the appropriate grades for offenses as it develops sentencing guidelines. Current maximum penalties are set at very uneven levels, and some are so inconsistent with the relative seriousness of the offense that the Sentencing Commission will probably find it necessary to recommend some amendments before sentencing guidelines are in place. The Committee will welcome the Commission's suggestions.

Two primary goals are achieved by this section. The first clarifies the applicability of the various sentencing provisions in title 18 by indicating how the new grading scheme will apply to existing offenses until they are graded by legislation. The second substantially increases maximum fine levels for most offenses. Section 3559 achieves these goals in a simple fashion without implying that sentences have been rationalized—a step which the Committee believes should be undertaken with the assistance of the Department of Justice, the United States Sentencing Commission, and other interested agencies, after passage of this bill. Not only are there too many criminal offenses, and little rationality in the sentences provided for those offenses, but there is also no clear line between the use of civil and criminal sanctions for essentially regulatory offenses.

Section 3559 (a) grades offenses for which no letter grade is provided according to the maximum term of imprisonment applicable to the offense.

Section 3559 (b) states that the sentence for an offense graded according to subsection (a) has the attributes of any other sentence with that grade under the bill with one exception: the fine may not exceed the maximum fine authorized by the bill or the statute that describes the offense, whichever is higher. Thus, section 3559 will often have the effect of increasing the maximum fine provided in current law, but never of lowering it.

The Committee intends that future legislation creating new Federal offenses specify the grade for the offense. It encourages the Committees with other substantive jurisdiction to consult with this Committee and the Department of Justice in determining the appropriate grade for offenses. The Committee is aware, however, that future legislation may be passed that inadvertently fails to take these steps. Accordingly, section 3559 will clarify questions that might otherwise arise as to the applicability of the general Federal sentencing law to the new offense.

SUBCHAPTER B—PROBATION

(Sections 3561-3566)

This subchapter governs the imposition, conditions, and possible revocation of a sentence to a term of probation. In keeping with modern criminal justice philosophy, probation is described as a form of sentence rather than, as in current law, a suspension of the imposition or execution of sentence.

SECTION 3561. SENTENCE OF PROBATION

1. In general

Proposed 18 U.S.C. 3561 authorizes the imposition of a sentence to a term of probation in all cases, unless the case involves a Class A or B felony or an offense for which probation has been expressly precluded, or the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense. The section also specifies the maximum permissible terms of probation and specifies a minimum of one year's probation for a convicted felon. Separate terms are set forth for felonies (not less than one nor more than five years), misdemeanors (not more than two years), and infractions (not more than one year).

2. Present Federal law

18 U.S.C. 3651 authorizes the court to suspend the imposition or execution of the sentence of a person convicted of an offense, other than one punishable by death or life imprisonment, and place the person on probation.[193] The maximum term of probation, including any extension, is five years for any offense. The section also provides that, if an offense is punishable by more than six months in prison but is not punishable by death or life imprisonment, the judge may impose a sentence split between imprisonment and probation. Such a split sentence must be for a term in excess of six months, with no more than six months spent in prison, and with the remainder suspended and the defendant placed on probation. A few statutes, such as 18 U.S.C. 924(c), provide that an offender convicted of a particular offense may not be placed on probation.

3. Provisions of the bill, as reported

Proposed 18 U.S.C. 3561, unlike current law, states that probation is a type of sentence rather than a suspension of the imposition or execution of a sentence. Section 3561(a) specifies that a term of probation may be imposed except in three instances.

First, subsection (a)(1) excludes Class A and Class B felony offenders from receiving a sentence of probation, thus excluding, as does present law, those offenders subject to a penalty of life imprisonment or death. The section goes beyond current law by also precluding a sentence of probation for those convicted of an offense with a maximum authorized prison term, pursuant to § 3581(b)(2), of not more than 25 years. Second, under subsection (a)(2), probation is unavailable to an offender who is convicted of an offense for which the imposition of a sentence of probation is specifically precluded.[194]

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[193] See proposed 18 U.S.C. 3551; ABA, "Standards Relating to Sentencing Alternatives and Procedures," § 18-2.3(a) (1979).

Third, subsection (a)(3) differs from the provision of 18 U.S.C. 3651 that permits a sentence to be split between a term of imprisonment and a suspended sentence with probation[195] by specifically barring a sentence to probation in a case in which a defendant has been sentenced at the same time to a term of imprisonment either for the same offense or for a different offense. The same result may be achieved by a more direct and logically consistent route—under sections 3581 and 3583, the court may provide that the convicted defendant serve a term of imprisonment followed by a term of supervised release. The provision will permit latitude in the specification of the time to be spent in the custody of the Bureau of Prisons and in the nature of the facility. It will also be more flexible than current law in permitting a sentence to imprisonment of any permissible length to be followed by a term during which the defendant receives street supervision. The Committee is of the opinion that this flexibility will permit the court to formulate a sentence best suited to the individual needs of the defendant. For example, a convicted defendant could in an appropriate case be required to spend the first three months in prison, followed by two years of street supervision, or could be sentenced to spend two years in prison followed by six months' street supervision. If, instead, the judge believes that full-time incarceration of a convicted defendant is not appropriate but is concerned that the defendant needs more supervision than is generally available to a person on street supervision, he can sentence him to probation on the condition that he spend evenings or weekends in prison as a condition of probation (section 3563(b)(11)) or live in a community corrections facility during part of his term of probation (section 3563(b)(2)). Such provision would permit the defendant to continue employment and his contacts with his family and community.

A major distinction between the proposed section and existing law is the maximum term of probation authorized for an offense. 18 U.S.C 3651 provides a term of probation of up to five years without regard to the seriousness of the offense. Section 3561(b), on the other hand, provides for differing terms depending on the seriousness of the violation. When the offense is a felony there is a minimum term of one year and a maximum of five years. A misdemeanor conviction may lead to a term of probation of up to five years with no required minimum. An infraction may result in up to one year's probation, again with no minimum.[196]

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[194] The Committee generally looks with disfavor on statutory minimum sentences to imprisonment, since their inflexibility occasionally results in too harsh an application of the law and often results in detrimental circumvention of the laws. The Committee believes that for most offenses the sentencing guidelines will be better able to specify the circumstances under which an offender should be sentenced to a term of imprisonment and those under which he should be sentenced to a term of probation.

[195] 18 U.S.C. 4205(f) provides a procedure, which achieves the same result, by which the court may specify that a person sentenced to a term of imprisonment of more than six months and less than one year shall be released as if on parole at a date prior to the expiration of his sentence.

While the Committee is generally opposed to statutory minimum sentences, it believes that a convicted felon who is sentenced to probation rather than to a term of imprisonment should be subject to the jurisdiction of the court for a period of at least a year. Requiring this minimum probationary period will assure that he is able to comply with the law for that period and that he will be subject to at least one other condition set forth in section 3563(a)(2).

The section, like current law, creates no presumption for or against probation. The Committee believes that the sentencing guidelines can more adequately delineate those cases in which a term of probation is preferable to a term of imprisonment, or vice versa, as a means of achieving the purposes of sentencing set forth in section 3553(a)(2).

SECTION 3562. IMPOSITION OF A SENTENCE OF PROBATION

1. In general

Section 3562 sets forth the criteria to be considered by the court in determining whether to impose a sentence of probation and in determining the length of the term and the conditions of probation. It also makes clear that, despite the susceptibility of a term of probation to modification, revocation, or appeal, a judgment of criminal conviction that includes such a sentence constitutes a final judgment for all other purposes.

2. Present Federal law

18 U.S.C. 3651 authorizes the court to impose probation when it is "satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby."[197] 18 U.S.C. 5010(a) permits the judge to place a youth offender or young adult offender [198] on probation if the "court is of the opinion that the * * * offender does not need commitment". Probation is a matter of discretion and not of right.[199]

While the statutory law is silent on the subject of the finality of a judgment that includes probation, the courts have held that such a judgment, whether it suspends execution of the sentence or suspends imposition of sentence, constitutes a final judgment for purposes of appeal from conviction.[200] They have also held that the courts may not suspend imposition or execution of sentence unless they place the convicted offender on probation.[201]

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[196] The National Commission had proposed inflexible terms of probation of five years for a felony, 2 years for a misdemeanor, and 1 year for an infraction. The Committee believes that such fixed periods might unduly restrict the court's options. See the recommendation of the National Legal Aid and Defender Association, Subcommittee Criminal Code Hearings, Part III, at 1420.

[197] It has been held that probation is authorized, under reasonable conditions, pursuant to this statute for organizations as well as individuals. *United States* v. *Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972), *United States* v. *J. C. Ehrlich Co. Inc.*, 372 F. Supp. 768 (D. Md. 1974).

[198] See 18 U.S.C. 4216.

[199] *United States* v. *Birnbaum*, 421 F.2d 993 (2nd Cir.), cert. denied, 397 U.S. 1044, rehearing denied, 398 U.S. 944 (1970).

[200] *Korematsu* v. *United States*, 319 U.S. 432 (1943).

[201] *United States* v. *Ellenbogen*, 390 F.2d 537 (2d Cir.), cert. denied, 393 U.S. 918 (1968).

3. Provisions of the bill, as reported

Proposed 18 U.S.C. 3562 requires that the judge, in determining whether to impose a sentence to a term of probation upon an organization or an individual, and in setting the term and conditions of any sentence to probation that is imposed, consider the factors set forth in section 3553(a) to the extent that they are applicable. In the abstract, the factors required to be considered create no presumption either for or against probation. They are set out merely to make more specific the considerations traditionally taken into account by the courts under the broad language of 18 U.S.C. 3651 and to assure their being given appropriate weight in all cases. They are designed to assist the court in exercising its discretion reasonably.

The effect of these considerations is to require the court to focus carefully upon the needs of the defendant and the needs of society. Those who emphasize the rehabilitative purpose of sentencing to the exclusion of other purposes have supported the view that probation should be the sentence of preference.[202] Others who would emphasize the necessity of providing effective deterrence to criminal conduct and to insure just punishment of offenders in a time of rapidly rising crime rates have suggested that there should be a presumption against the utilization of the sentence of probation for some of the most serious offenses by calling for mandatory minimum prison terms. There is no doubt that imprisonment, when compared with probation, is more effective as punishment, is more readily perceived by the public as a deterrent, and is clearly the most effective means of incapacitation for protection of the public. On the other hand when the purpose of sentencing is to provide the educational opportunity, vocational training, or other correctional treatment required for rehabilitation, given the current state of knowledge, probation is generally considered to be preferable to imprisonment. This does not mean, however, that it is not possible to formulate conditions of probation that will serve deterrent and punishment purposes—or even limited incapacitative purposes—in an appropriate case. Thus, the Committee feels that the best course is to provide no presumption either for or against probation as opposed to imprisonment, but to allow the Sentencing Commission and, under its guidelines, the courts, the full exercise of informed discretion in tailoring sentences to the circumstances of individual cases.

In a particular case, the required consideration of the purposes of sentencing and of the sentencing guidelines and policy statements issued pursuant to 28 U.S.C. 994(a) should serve to sharpen the court's focus on all matters pertinent to its decision. The Committee is of the view that in the past there have been many cases, particularly in instances of major white collar crime, in which probation has been granted because the offender required little or nothing in the way of institutionalized rehabilitative measures and because society required no insulation from the offender, without due consideration being given to the fact that the heightened deterrent effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance. The placing on probation of an embezzler, a confidence man, a corrupt politician, a businessman who has repeatedly violated regulatory laws, an operator of a pyramid sales scheme, or a tax violator, may be perfectly appropriate in cases in which, under all the circumstances, only the rehabilitative needs of the offender are pertinent; such a sentence may be grossly inappropriate, however, in cases in which the circumstances mandate the sentence's carrying substantial deterrent or punitive impact. This is not meant to imply that the Committee considers a sentence of imprisonment to be the only form of sentence that may effectively carry deterrent or punitive weight. It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose.[203] This is particularly true in light of the new requirement in section 3563 (a) that a convicted felon who is placed on probation must be ordered to pay a fine or restitution or to engage in community service; he cannot simply be released on probation with no meaningful sanction. Similarly, the Committee expects that in situations in which rehabilitation is the only appropriate purpose of sentencing, that purpose ordinarily may be best served by release on probation subject to certain conditions. In sum, the presence of the same predominant reason for imposing a sentence in different cases will not always lead logically to the same type of sentence. A congressional statement of a preferred type of sentence might serve only to undermine the flexibility that the criminal justice system requires in order to determine the appropriate sentence in a particular case in the light of increased knowledge of human behavior.

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[202] See Subcommittee Criminal Code Hearings, Part XI, at 7796-7862 (statement on behalf of the National Legal Aid and Defenders Association).

The Committee is also mindful that during a period in which the incidence of a particular kind of crime is increasing rapidly, it may be entirely appropriate for the court to give paramount emphasis to the deterrent purpose of sentencing. Conversely, in a situation involving an offense of little notoriety that is not frequently committed and that is committed under circumstances indicating little likelihood of recidivism, the singular significance of the rehabilitative purpose of sentencing may well almost mandate a sentence to probation. In all cases, the section's concentration of attention upon the aims of the criminal justice system is designed to encourage the intelligent balancing of often competing considerations.

The application of the specified considerations requires the court first to consider the nature of the offense and the history and characteristics of the offender. With those in mind, it must then consider the four basic purposes of sentencing as established in section 3553(a)(2) to the extent that one or more of them are applicable to the case, and must examine the sentencing guidelines and policies of the Sentencing Commission. Having considered these factors, the court is then required to determine whether a term of probation would be appropriate and, if so, the length and condition of such a term.

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[203] See, e.g., 16 Cr. L. Rptr. 2178, 2183 (Nov. 1974) (transcript of interview with Judge Charles B. Renfrew of the Northern District of California).

The language of section 3562(b) is intended to codify current judicial decisions which hold that judgments imposing probation are final judgments for all purposes, particularly for purposes of appeal, even though the sentence is subject to compliance with specified conditions, is revocable for noncompliance with those conditions,[204] and is subject to modification, extension, or early termination in certain situations.[205] The language of section 3562(b)(3) is intended to make clear that a sentence that may be appealed because it is outside the guidelines is provisional for the purpose of appeal of the sentence pursuant to section 3742, but is otherwise final.[206]

SECTION 3563. CONDITIONS OF PROBATION

1. In general

Proposed 18 U.S.C. 3563(a) sets forth mandatory conditions of probation. It specifies that the court must provide—as a condition of probation for a defendant convicted of any Federal offense—that the defendant not commit another Federal, State, or local crime during the term of probation, and—as a condition of probation for a defendant convicted of a felony—that the defendant pay a fine or restitution, or engage in community service.

Proposed 18 U.S.C. 3563(b) sets out optional conditions which may be imposed, the last of which makes clear that the enumeration is suggestive only, and not intended as a limitation on the court's authority to consider and impose any other appropriate conditions.

Proposed 18 U.S.C. 3563(c) permits the court, after a hearing, to modify or enlarge the conditions during the term of probation, pursuant to the provisions applicable to the initial setting of the conditions of probation.

Proposed 18 U.S.C. 3563(d) requires that the defendant be provided with a written statement clearly setting out all the conditions of the sentence of probation.

2. Present Federal law

18 U.S.C. 3651 authorizes the imposition of probation "upon such terms and conditions as the court deems best." The section does not mandate the imposition of any condition of probation but does list several specific conditions which may be required, i.e., paying of a fine, making of restitution, supporting of dependents, submitting to treatment of addiction, or residing in or participating in the programs of a residential community treatment center. These, however, in view of the broad general grant of statutory authority, have been viewed as examples of, rather than limitations on, the kinds of conditions that a court may place on probation.[207] 18 U.S.C. 3651 also authorizes the court to impose a split sentence, if the maximum authorized term of imprisonment is more than six

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[204] *Nix* v. *United States*, 131 F.2d 857 (5th Cir.), cert. denied, 318 U.S. 771 (1943); *Buhler* v. *Pescor*, 63 F. Supp. 632 (W.D. Mo. 1945).

[205] See, e.g., *United States* v. *Albers*, 115 F.2d 833 (2d Cir. 1940).

[206] See proposed 18 U.S.C. 3742.

[207] See, e.g., *Trueblood Longknife* v. *United States*, 381 F.2d 17, 19 (9th Cir. 1967); *U.S.* v. *Alarik*, 439 F.2d 1349, 1351 (8th Cir. 1971).

months and the offense is not punishable by death or life imprisonment. Such a sentence is for no more than six months' imprisonment with the imposition or execution of the remainder of the sentence suspended and the defendant placed on probation. The court may revoke or modify any condition of probation.

3. Provisions of the bill, as reported

Proposed 18 U.S.C. 3563(a) goes beyond the provisions of current law in requiring that the court impose one mandatory condition of probation on an offender convicted of a misdemeanor or an infraction, and two mandatory conditions on an offender convicted of a felony.

Under subsection (a)(1), the court is required to provide as a condition of probation for any offense that the defendant not commit another crime during the term of probation.[208] It should be emphasized, however, that this is the only mandatory condition of probation for an offender convicted of a misdemeanor or an infraction. The court is not required, for example, to specify as a condition of probation even that the offender report regularly to a probation officer since is some cases the court may conclude that unsupervised probation is appropriate.[209]

Under subsection (a)(2), the court is also required to impose on a convicted felon who is sentenced to a term of probation a condition that he pay a fine or restitution,[210] or that he engage in community service. This requirement assures that a convicted felon will receive a publicly discernible penalty even if the circumstances of the offense do not justify a term of imprisonment. It also assures that the sentence will be fashioned to serve deterrent or punishment purposes as well as rehabilitative purposes in appropriate cases. (The court may in appropriate cases impose a combination of the conditions described in subsection (a) (2).)

Proposed 18 U.S.C. 3563(b) lists some of the discretionary conditions that may be placed on a probationer's freedom. These conditions must be reasonably related to the nature and circumstances of the offense, the history and characteristics of the offender, and the four purposes of sentencing set forth in section 3553(a)(2). If a condition involves a deprivation of property or liberty, it must also be reasonably necessary to carry out the purposes of sentencing set forth in section 3553(a)(2). In addition, under section 3562(a), the policy statements and sentencing guidelines promulgated by the Sentencing Commission would be considered in determining the conditions of probation. Most of the conditions set forth in section 3563(b) have been used and sanctioned in appropriate cases under the current statute.[211] The list is not exhaustive, and it is not intended at all to limit the court's options—conditions of a nature very similar to, or very different from, those set forth may also be imposed. On the other hand, except as provided in subsection (a), none of the conditions listed in the subsection are required to be imposed. The conditions, many of which closely follow the proposals of the National Commission,[212] are simply designed to provide the trial court with a suggested listing of some of the available alternatives which might be desirable in the sentencing of a particular offender.[213] It is anticipated that, in determining the conditions upon which a defendant's probation is to be dependent, the court will review the listed examples in light of the Sentencing Commission's guidelines and policy statements, weigh other possibilities suggested by the case, and, after evaluation, impose those that appear to be appropriate under all the circumstances. It is certainly not intended that all the conditions suggested in subsection (b) be used for every defendant, but rather that conditions be tailored to each defendant to carry out the purposes of probation in his case. In addition, the court may not impose a condition of probation which results in a deprivation of liberty for the defendant unless that deprivation is "reasonably necessary" to carry out the purposes of the sentence.

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[208] This provision recognizes statutorily a current practice of the federal courts.

[209] This differs somewhat from current practice. The form used by federal judges to list conditions of probation lists a number of conditons routinely imposed, such as maintaining reasonable hours, notifying probation officer of job changes, not leaving the district without notifying the probation officer, and reporting to the probation officer as required. While the Committee agrees that these conditions should be imposed when the case warrants, it does not think the conditions should apply in all cases.

[210] A condition of restitution is a mandatory condition of probation in another sense as well. Under 18 U.S.C. 3579(g) (which is redesignated 18 U.S.C. 3663(g) by section 2(a)(1) of this bill),. if a defendant is placed on probation and ordered to pay restitution, the restitution order is a condition of probation by operation of law.

Paragraph (1) carries forward the discretionary probation condition in current law that requires the defendant to support his dependents and expands the condition to permit the court to order in appropriate cases that the defendant meet other family responsibilities.

Paragraph (2) carries forward current law in permitting the imposition of a condition of probation requiring payment of a fine, thus making the recalcitrant offender face the possibility of a summary increase in punishment for such a probation violation, as opposed to leaving him to face only the normal fine collection procedures. Of course, as provided by section 3572(a), the fine may be not set so high that the defendant, acting in good faith, is unable to pay it. A fine may be imposed both as a separate sentence and as a condition of probation. It also may be imposed pursuant to subsection (a)(2) as a mandatory condition of probation on a convicted felon instead of or in addition to a condition ordering payment of restitution or community service.

Paragraph (3) carries forward the current law provision permitting imposition of a condition that the defendant be required to make restitution to a victim. If a person placed on probation is ordered to make restitution, that order automatically becomes a condition of probation.[214] The court could in an appropriate case order restitution not covered by paragraph (b)(3) (and section 3556) under the general provisions of subsection (b)(20). In a case involving bodily injury, for example, restitution as a condition of probation need not necessarily be limited to medical expenses. The defendant in a particular case may have an interest in satisfying such a condition if it will cause the court to forego sentencing him to a term of imprisonment. The court may also choose to impose a requirement of payment of restitution as the mandatory condition of probation he must impose pursuant to subsection (a)(2).

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[211] See, e.g., *Bernal-Zazueta* v. *United States*, 225 F.2d 64 (9th Cir. 1955) (no commission of crime during term of probation); *United States* v. *Wilson*, 469 F.2d 368 (2d Cir. 1972) (support dependents and meet family obligations); *Stone* v. *United States*, 153 F.2d 331 (9th Cir. 1946) (payment of fine, refrain from specified employment); *United States* v. *Velazco-Hernandez*, 565 F.2d 583 (9th Cir. 1977) *United States* v. *Miller*, 549 F.2d 105 (9th Cir. 1976) (refrain from use of alcohol); *Whaley* v. *United States*, 376 U.S. 911 (9th Cir. 1963), cert. denied, 376 U.S. 911 (refrain from employment in business related to offense).

[212] National Commission Final Report, *supra* note 1, § 3103.

[213] While most of the conditions have as their primary purpose the rehabilitation of the offender, some of the listed alternatives, of course, would also tend to affect the punitive and deterrent purposes of sentencing—and even, to a certain degree, the incapacitative purpose in limited kinds of cases.

[214] See 18 U.S.C. 3663(g) (former 18 U.S.C. 3579(g)).

Paragraph (4) permits the judge to require that the defendant give notice of his conviction to victims of the offense in accord with the provisions of section 3555. An order of notice may be both a separate sentence and a condition of probation. Making an order of notice a condition of probation gives the court the possibility of revocation of probation as an enforcement tool for violation of the condition.

Paragraph (5) permits the judge to order as a condition of probation that the defendant work conscientiously at suitable employment or conscientiously pursue a course of study or vocational training that will equip him for suitable employment. When combined with other appropriate conditions, this condition might enable the court to avoid sending to prison some defendants who might otherwise be incarcerated. For example, a judge might devise a probation program for a non-dangerous defendant whereby he spend evenings or weekends in prison or live in a community corrections facility, and work or go to school during the day.

Paragraph (6) suggests the condition that an individual defendant refrain from engaging in a specific occupation, business, or profession, or that either an individual or organization offender engage in a specified occupation, business, or profession only to a stated degree or under specified circumstances. The condition may be imposed only if the occupation, business, or profession bears a reasonably direct relationship to the nature of the offense. Thus a bank teller who embezzles bank funds might be required not to engage in an occupation involving the handling of funds in a fiduciary capacity.[215] Similarly, an organization convicted of executing a fraudulent scheme might be directed to operate that part of the business in a manner that was not fraudulent. The Committee recognizes the hardship that can flow from preventing a person from engaging in a specific occupation, business, or profession, particularly for those activities requiring many years of education and experience. This particular condition of probation should only be used as reasonably necessary to protect the public. It should not be used as a means of punishing the convicted person. Insofar as this paragraph might be used to disqualify a person from holding a management position in an organization, the Committee emphasizes that, absent some other relationship between the position held and the nature of the offense, such a disqualification must bear a reasonable relationship to an abuse of the managment position for a criminal purpose. Paragraph (6) is intended to be used to preclude the continuation or repetition of illegal activities while avoiding a bar from employment that exceeds that needed to achieve that result. The Committee has modified paragraph (6) from the langauage in S. 1437 as passed by the Senate in the 95th Congress. The provision had originally been cast in terms of ordering an organization, as well as an individual, to refrain from engaging in a particular occupation, business, or profession. Because of business concerns that the listing of the conditions might encourage inappropriate use to put a legitimate enterprise out of business, that part of the provision has been modified to relate only to individual offenders. This deletion should not be construed to preclude the imposition of appropriate conditions designed to stop the continuation of a fraudulent business in the unusual case in which a business enterprise consistently operates outside the law.

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[215] The constitutional permissibility of such a condition has been recognized. See *Whaley* v. *United States*, 324 F.2d 356 (9th Cir. 1963), cert. denied, 376 U.S. 911 (1964).

Paragraph (7) allows the court to require the offender to refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons.[216] As in the case with the other discretionary conditions of probation listed in section 3563, the conditions suggested by this paragraph would have to be tailored to the particular circumstances of the defendant. For example, if the defendant were a convicted drug trafficker, it might ordinarily make sense to condition his probation upon his avoidance of other known drug traffickers, but if he were to be employed during the period of his probation by a business that makes a practice of hiring former offenders, the application of such a condition would have to be designed to avoid any suggestion that the defendant could not engage in necessary occupational associations with his coworkers.

Paragraph (8) permits the court to require as a condition of probation that the defendant refrain from the excessive use of alcohol and from any use of narcotic drugs or other controlled substances without a prescription from a licensed medical practitioner. It is not intended that this condition of probation be imposed on a person with no history of excessive use of alcohol or any illegal use of a narcotic drug or controlled substance. To do so would be an unwarranted departure from the principle that conditions of probation should be reasonably related to the general sentencing considerations set forth in section 3553(a)(1) and (a)(2).

Paragraph (9) permits the imposition of a condition of probation prohibiting the defendant from possessing a firearm, destructive device, or other dangerous weapon. While this condition may only be imposed if it is reasonably related to the purposes of sentencing, there are, of course, other Federal, State, and local restrictions on firearms and explosives which may apply to the defendant as well.

Paragraph (10) notes the availability of the condition that the defendant undergo medical or psychiatric treatment as specified by the court and remain in a specified institution if required for medical or psychiatric purposes. Under this paragraph a court may require a defendant to participate in the program of a narcotic or alcohol treatment facility, regularly visit a psychiatrist, participate in a recognized group therapy program, or undergo some other form of treatment for physical or emotional problems. Because receipt of treatment in an institution rather than on an outpatient basis would involve a deprivation of liberty, the judge would have to assure himself that it was reasonably necessary to a purpose of sentencing set forth in section 3553(a)(2) to require residence at an institution.

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[216] This kind of provision has also been recognized as permissible. See *Birzon* v. *King*, 469 F.2d 1241 (2d Cir. 1972). The phrase "unnecessarily associating" is meant to be construed as not precluding "incidental contacts between ex-convicts in the course of work on a legitimate job for a common employer." *Arciniega* v. *Freeman*, 404 U.S. 4 (1971).

Paragraph (11) authorizes as a condition that the probationer remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time not to exceed in the aggregate one year, during the first year of probation. This provision permits short periods of commitment to a training center or institution as a part of a rehabilitative program. Flexibility is provided by permitting confinement in split intervals, thus authorizing, for example, weekend imprisonment with release on probation during the week for educational or employment purposes, or nighttime imprisonment with release for such purposes during working hours. This condition could be used only to deprive the defendant of his liberty to the extent "reasonably necessary" for the purposes set forth in section 3553(a)(2). It could also be used, for example, to provide a brief period of confinement, e.g., for a week or two, during a work or school vacation. It is not intended to carry forward the split sentence provided in 18 U.S.C. 3651, by which the judge imposes a sentence of a few months in prison followed by probation. If such a sentence is believed appropriate in a particular case, the judge can impose a term of imprisonment followed by a term of supervised release under section 3583, which section was amended by the Committee in the 97th Congress to permit such application.

Paragraph (12) provides that the judge may impose as a condition of probation that the defendant reside at, or participate in the program of, a community corrections facility for all or part of the term of probation.

Paragraph (13) provides that the judge may require as a condition of probation that the defendant work in community service as directed by the court. This provision is intended by the Committee to encourage continued experimentation with community service as an appropriate condition in some cases. This condition is also one of the three choices from which the judge must select a mandatory condition to be imposed on a convicted felon who is sentenced to probation. This condition might prove especially useful in a case in which the imposition of a fine or restitution is not appropriate, either because of the defendant's inability to pay or because the victims cannot be readily identified or the actual amount of injury is slight.

Paragraph (14) notes that the probationer may be required to reside in a certain place or refrain from residing in a particular place, thus permitting the court to remove the defendant from a detrimental environment which apparently contributed to his prior anti-social behavior (e.g., a criminogenic environment) and to reside during the term of probation in an area—perhaps in a distant district [217] more conducive to rehabilitation.

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[217] See proposed 18 U.S.C. 3605.

Paragraphs (15) through (19) contain commonly employed conditions relating to day-to-day supervision of a probationer. Paragraph (15) permits the court to order that the defendant remain in the jurisdiction of the court unless he receives permission from the court to leave. In appropriate cases, of course, jurisdiction over the probationer may be transferred from one district to another, even on a short-term basis, in order to assure continuing supervision over the probationer. Paragraph (16) permits the court to order that the defendant report to a probation officer as directed by the court or the probation officer. This condition in not mandatory—a defendant may be placed on unsupervised probation with only the condition that he not commit a crime or with another condition that does not require day-to-day supervision, such as an order to pay a fine or to make restitution. Paragraph (17) permits the judge to order as a probation condition that a probation officer be permitted to visit the defendant at home or at another place specified by the court (but not by the probation officer). Paragraph (18) relates to answering inquiries of the probation officer and notifying him of any change of address or employment. Paragraph (19) permits the court to require that the defendant notify the probation officer promptly if he is arrested or questioned by a law enforcement officer.

Finally, paragraph (20), like current law, permits the judge to fashion other conditions of probation. These would include, inter alia, conditions to achieve the assistance of the defendant in effectuating the goals of other listed conditions.

Unlike current law, subsection (b) specifically states that the conditions must be reasonably related to the factors set forth in section 3553 (a)(1) and (a)(2), and that any condition that involves a restriction of liberty must be reasonably necessary to the purposes of sentencing set forth in section 3553(a)(2). This language is designed to allay the fears of such disparate groups as the ACLU and the Business Roundtable that probation conditions might be too restrictive in a particular case or might involve more supervision than is justified by the case. The judge is limited in imposing conditions of probation to imposing only those that carry out the purposes of sentencing in a particular case. He cannot restrain the liberty of a defendant who does not need that level of punishment or incapacitation, nor can he place business conditions on an organization that are unrelated to the purposes of sentencing for the offense of which the organization is convicted. It is not the intent of the Committee that the courts manage organizations as a part of probation supervision, but it is the intent of the Committee that all necessary conditions that are related to the characteristics of the offense and the offender and that are directed to the purposes of sentencing be imposed.

Proposed 18 U.S.C. 3563(c) provides that the court, after a hearing,[218] may, pursuant to the provisions applicable to the initial setting of conditions of probation, modify, reduce or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation. This provision brings forward the substance of current law (18 U.S.C. 3651) and Rule 32.1(b) of the Federal Rules of Criminal Procedure. It enables the court to adjust the conditions of probation to the changed circumstances of the defendant.

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[218] See *Skipworth* v. *United States*, 508 F.2d 598 (3d Cir. 1975).

The requirement in proposed 18 U.S.C. 3563(d) that the court direct the probation officer to provide to a defendant a written statement that sets forth the conditions of a sentence of probation with sufficient clarity and specificity that it can serve as a guide for the defendant's conduct and for such supervision as is required, is new to Federal law.[219] The Committee believes, however, that such a statement should be required both as a matter of fairness and as a matter of efficient program administration.[220]

SECTION 3564. RUNNING A TERM OF PROBATION

1. In general

This section governs the commencement of a term of probation, the effect of other sentences upon the running of the term, and the court's power to terminate or extend a term of probation.

2. Present Federal law

While the probation provisions of current title 18 are silent as to when a term of probation commences, the courts have held that, unless another time is specified in the order, it begins when the judge imposes sentence.[221] Rule 38(a)(4) of the Federal Rules of Criminal Procedure provides that if the order placing the defendant on probation is not stayed, the court shall specify when the term of probation shall commence.

The provisions of the current statutes are also silent with regard to the running of multiple terms of probation. Where the question has arisen, the courts have held that such terms may be consecutive but may not exceed the maximum term of five years provided by 18 U.S.C. 3651.[222] If, however, the court has not specified whether two terms of probation are to run consecutively or concurrently, it has been held that the presumption is that they run concurrently.[223]

The current statutes do not specify whether a term of probation can run concurrently with a sentence of imprisonment. While most courts have held that probation is tolled by a sentence of imprisonment,[224] at least one court has held that incarceration for an offense committed prior to the imposition of probation does not toll the term of probation.[225]

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[219] See *Zaroogian* v. *United States*, 367 F.2d 959 (1st Cir. 1966); *McHugh* v. *United States*, 230 F.2d 262 (1st Cir.), cert. denied, 351 U.S. 955 (1956).

[220] An error in the recitation of conditions in the statement, or even an accidental failure to supply such a statement, should not necessarily be construed as a reason to impugn the propriety or validity of a decision to revoke or modify the probation because of a breach of a condition actually imposed, since the court will have stated those conditions during the sentencing proceeding in any event.

[221] *Gaddis* v. *United States*, 280 F.2d 334 (6th Cir. 1960); *Davis* v. *Parker*, 293 F. Supp. 1388 (D.C. Del. 1968).

[222] *United States* v. *Pisano*, 266 F. Supp. 913 (E.D. Pa. 1967). But see *United States* v. *Lancer*, 361 F. Supp. 129 (E.D. Pa. 1973), vacated and remanded on other grounds, 508 F.2d 719 (3d Cir. 1975), cert. denied, 421 U.S. 989, in which the court held that, where two indictments were consolidated at the defendant's request, the court could impose two consecutive terms of probation that totalled in excess of five years.

[223] *Engle* v. *United States*, 332 F.2d 88 (6th Cir. 1964), cert. denied, 379 U.S. 903.

[224] *U.S. ex rel Demarois* v. *Farrell*, 87 F.2d 957 (10th Cir.), cert. denied, 302 U.S. 683, rehearing denied, 302 U.S. 775 (1937); *Ashworth* v. *United States*, 392 F.2d 245 (6th Cir. 1968).

18 U.S.C. 3653 grants discretion to a court, upon review of a probationer's conduct, to discharge the probationer from supervision and terminate the proceedings against him, or to extend the term of probation. However, the authority to extend the term of probation is subject to the five-year limitation contained in 18 U.S.C. 3651.[226]

3. Provisions of the bill, as reported

Subsection (a) of proposed 18 U.S.C. 3564 provides that the term of probation commences on the day the sentence of probation is imposed, unless otherwise ordered by the court.

Subsection (b) provides that multiple terms of probation are to run concurrently, regardless of when or for what offenses or by what jurisdiction they are imposed, and that a term of probation is to run concurrently with a term of supervised release. Consequently, unlike the situation under current law, consecutive terms of probation may not be imposed. Of course, if a defendant is sentenced to terms of probation for offenses of varying seriousness, the maximum term of probation would be measured according to the term for the most serious offense. This subsection also makes it clear that probation does not run during any period in which the defendant is incarcerated for a period of at least 30 consecutive days in connection with a Federal, state or local criminal conviction.

Subsection (c) authorizes the court, after considering the factors set forth in section 3553(a), to terminate a term of probation and to discharge the defendant prior to its expiration at any time in the case of a misdemeanor or an infraction or at any time after one year in the case of a felony, if the conduct of the defendant and the interest of justice warrant such action. While current law [227] permits such early termination at any time without regard to the degree of the offense, it appears appropriate to retain the court's jurisdiction over an offender convicted of a felony for at least a one-year period. If the court determines that an offender does not need active supervision, it may impose only the least onerous discretionary conditions of probation that it decides to be advisable, or may permit the probationer to remain at liberty subject only to the conditions that he not commit another offense and, if he is convicted of a felony, that he pay a fine or restitution, or engage in community service.[228]

Subsection (d) authorizes the court, after a hearing and pursuant to the provisions applicable to the initial setting of the term of probation, to extend a term of probation, at any time prior to its expiration or termination, unless the maximum term was previously imposed. This provision is necessary, the Committee believes, to encourage judges to initially impose what appears to be the most appropriate length for the term of probation. If judges feared that a term would later be found to be too short and that the court would be powerless to extend it, they might well feel constrained to impose the maximum term in all cases.

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[225] *United States* v. *Pisano*, *supra* note 222.

[226] *United States* v. *Edministon*, 69 F. Supp. 382 (W.D. La. 1947); *United States* v. *Buchanan*, 340 F. Supp. 1285 (E.D. N.C. 1972).

[227] 18 U.S.C. 3653.

[228] See proposed 18 U.S.C. 3653(a).

Subsection (e) provides that a term of probation remains subject to revocation during its continuance.

SECTION 3565. REVOCATION OF PROBATION

1. In general

This section provides that probation may be revoked if the defendant violates a condition of probation, and specifies the period during which such revocation may take place.

2. Present Federal law

18 U.S.C. 3653 provides that during the term of probation a probationer may be arrested by his probation officer without a warrant "for cause." It further provides that during the maximum term permitted by section 3651 (five years) the court may issue a warrant for the arrest of the probationer for a violation of a condition occurring prior to expiration of the term imposed. After arrest, the probationer must be taken as speedily as possible before the court having jurisdiction over him, whereupon the court may revoke probation and reinstate the sentence originally imposed, impose a lesser sentence, or, if imposition of the sentence was suspended, impose any sentence which could have been imposed at the time of the judgment of conviction. Rule 32.1 of the Federal Rules of Criminal Procedure outlines the rights of the defendant at the revocation hearing, including notice of the alleged violation, disclosure of evidence, an opportunity to appear and present evidence, right to counsel, and opportunity to question witnesses against him. The courts have held that after revocation of probation, no further probation may be ordered.[229]

3. Provisions of the bill, as reported

Section 3565(a) provides that if a defendant violates a condition of probation the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, either continue the defendant on the sentence of probation, subject to such modifications of the term or conditions of probation as it deems appropriate, or may revoke probation and impose any other sentence which could have been imposed at the time of the initial sentencing. Provisions governing the arrest of a probationer are contained in proposed 18 U.S.C. 3606; provisions governing the hearing to be accorded the probationer are contained in Rule 32.1.[230] The Committee felt it appropriate to leave procedural provisions concerning probation revocation rights in Rule 32.1 where they will remain subject to periodic revision by the Judicial Conference of the United States, if necessary.

Section 3565(b) provides that revocation of probation or imposition of another sentence may occur after the term of probation has expired if a violation of a condition occurred prior to the expiration, if the adjudication occurs within a reasonable period of time, and if a warrant or summons on the basis of an allegation of such a violation was issued prior to the expiration of the term of probation. Thus, the section more narrowly restricts the time within which probation may be revoked than does current 18 U.S.C. 3653, which permits revocation at any time within the maximum period of five years regardless of the term initially imposed or the seriousness of the offense.

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[229] *Fox* v. *United States*, 354 F.2d 752 (10th Cir. 1965).

[230] See e.g., *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973); see also *Morrisey* v. *Brewer*, 408 U.S. 472 (1972).

SECTION 3566. IMPLEMENTATION OF A SENTENCE OF PROBATION

This section, which has no counterpart in current law, merely directs attention to the fact that provisions governing the implementation of probation are contained in subchapter A of chapter 229.

SUBCHAPTER C—FINES

(Sections 3571-3574)

This subchapter sets the maximum monetary fines that may be imposed for the various levels of criminal offenses, specifies the criteria to be considered before imposition of fines, and provides for the subsequent modification or remission of fines previously imposed. In so doing, the bill makes major advances in using the mechanism of fines as an effective sanction for white collar crime and other highly profitable criminal offenses.

The Committee is of the view that fines generally have been an inappropriately under-used penalty in American criminal law, even though there are many instances in which a fine in a measured amount can constitute a highly effective means of achieving one or more of the goals of the criminal justice system. Part of the reason for the under-utilization of fines as a criminal sanction is the fact that the maximum levels of fines under current law, with rare exceptions,[231] are set so low that the courts are not able to use them effectively as a sentencing option. These statutory limits are largely the products of an earlier era when the average wage earner achieved a yearly income considerably lower than that common today, and when inflation had not yet reduced the value of currency to its present level.

There exists today the anomalous situation in which a typical felony may be punishable on the one hand by a maximum of five years' imprisonment, and on the other hand by a maximum fine of only $5,000 or $10,000.[232] Before the two facets of the stated penalty may be seriously considered as alternatives to one another, they must be of roughly equivalent severity. Yet today, five years of a person's freedom, even when measured according to the average individual's earning power alone, carries a value in excess of $50,000.

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[231] A dramatic exception is the provision of 21 U.S.C. 848 which permits a fine of $100,000 ($200,000 if the defendant is a recidivist) for the offense of operating a continuing drug-trafficking enterprise. Under this section, fines of up to $300,000 have been imposed on individuals under multiple-count indictments. See *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974). See also 15 U.S.C. 1, 2, and 3.

[232] Under most current law provisions, of course, such a statement of a penalty is usually not a recitation of two mutually exclusive alternatives: both the five-year maximum term of imprisonment and the $5,000 maximum fine may be imposed.

In a case in which a serious violation has occurred, but in which the court has found reason to explore alternatives to incarceration, the current state of the law needlessly hampers the court in its fashioning of an appropriate sentence. It is with the intent of enhancing the ability of the courts to fashion remedies appropriate to offenses by providing maximum fines at levels that are suitable to our times—and at levels that will help to eliminate the popular view that certain offenses will lead only to a nominal fine equivalent to a minor cost of doing business—that the Committee has drafted the provisions of the subchapter.

SECTION 3571. SENTENCE OF FINE

1. In general

Proposed 18 U.S.C. 3571 establishes the general statutory authority for the imposition of a fine as a penal sanction. The maximum amount of the fine that may be imposed in a particular case depends on whether the offense is classified as a felony, misdemeanor, or infraction; whether the offender is an individual or an organization; and, in the case of a misdemeanor, whether the offense resulted in loss of human life.

2. Present Federal law

Under the present Federal law, fines are specified as an authorized form of sentence for virtually all offenses. It is recognized that fines often represent the only useful sanction against corporations and other organizations, as well as being, in the view of many judges, the major acceptable penalty against significant numbers of individual Federal offenders. The authorized maximum limits, however, are generally very low. Complaints that current fine levels are insufficient to accomplish the purposes of sentencing are being voiced by Federal judges with increasing regularity.[233]

Present Federal law also includes large and logically inexplicable disparities in the levels of fines permitted as criminal sanctions for offenses of essentially similar natures. The following are examples.

A. Conspiracy to defraud the United States or to commit any offense against the United States is punishable by a maximum prison term of five years and by a fine of up to $10,000.[234] On the other hand, a conspiracy to prevent a person from accepting Federal office or to prevent a Federal official from discharging his duties, while graded more seriously in terms of the authorized maximum prison term, which is six years, carries a lesser maximum fine—$5,000.[235]

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[233] See the statement of Judge Renfrew of the Northern District of California in which he complains that the $50,000 maximum that he imposed in a price-fixing case was not sufficient under the circumstances and that "had the maximum been more than $50,000, the amount of the fines would have been substantially more as to all of the defendants * * * [H]ere, it seems to me, is a situation where clearly there's a need for increasing the amount of the fine." 16 Cr.L. Rptr. 2178, 2181 (Nov. 1974). See also the statement of Judge MacMahon of the Southern District of New York in which, upon imposing the maximum available fines of $75,000 on each of two millionaire defendants found guilty of evading $761,000 in taxes, he said that he regretted that the tax laws did not permit him to impose a higher fine on each defendant. New York Times, March 20, 1973, p. 26, col. 1. (Note too, that in each of these cases the fines available were substantially higher than those generally available in Federal criminal cases. Note also that the maximum fine levels for many antitrust offenses were substantially increased in the 94th Congress (15 U.S.C. 1, 2, and 3).)

[234] 18 U.S.C. 371.

[235] 18 U.S.C. 372.

B. Forgery of naturalization or citizenship papers carries the same maximum five-year prison term as does forgery of an entry visa, yet the former offense carries a maximum fine of $5,000 and the latter a maximum fine of only $2,000.[236] Moreover, another offense of this kind, falsification of an invoice by a consular official, carries a maximum prison term of three years and thus, presumably, is conceived to be a less serious offense than the two cited forgery offenses, yet it provides for a $10,000 fine.[237]

C. Robbery of a Federally insured bank is punishable by a fine of up to $5,000, as well as by a sentence to imprisonment.[238] Robbery of a post office must result in a term of imprisonment but cannot result in a fine.[239]

D. A postmaster who demands more than the authorized postage for mail matter and a vessel inspector who collects more than the authorized fee both are subject to a maximum prison term of six months. The vessel inspector can be fined up to $500, while the postmaster is subject to a maximum fine of only $100.[240]

E. One who injures property of the United States is subject to a fine of up to $10,000 if the damage exceeds $100, and a fine up to $1,000 if the damage is less than $100.[241] One who injures property of the United States on a wildlife refuge, no matter how much the damage, is subject to a maximum fine of only $500.[242]

F. A clerk of court who converts funds which have come into his hands by virtue of his official position may be punished by up to ten years' imprisonment if the amount exceeds $100.[243] Conversion by a clerk of court of funds which belong in the registry of the court also carries a maximum sentence of ten years in prison if the amount exceeds $100.[244] But in the former case a fine can equal double the amount converted, while in the latter a fine cannot exceed the amount converted.

3. Provisions of the bill, as reported

Subsection (a) authorizes the use of fines in criminal sentencing. There are no offenses for which a fine may not be imposed. As provided in section 3551(b) and (c), a fine may be imposed alone or in addition to any other sentence. Payment of a fine may also be made a condition of probation pursuant to section 3562(b)(2), or a mandatory condition of probation pursuant to section 3562(a)(2), so that revocation of probation is available as a means of enforcing the fine. A fine may also be made a condition of post-release supervision, permitting the court to hold a defendant in contempt if he fails to pay it.

Subsection (b) establishes the maximum limits of fines for felonies, misdemeanors, and infractions, except to the extent that a higher limit may otherwise be authorized in this chapter for the offense. The fine levels set forth in the subsection are considerably higher than those generally authorized by current law,[245] and are designed to establish an effective scale for pecuniary punishment and deterrence that will reflect current economic realties.[246] Penalties for organizations are set at higher levels than those for individuals, following the New York model,[247] in order to take cognizance of the fact that a sum of money that is sufficient to penalize or deter an individual may not be sufficient to penalize or deter an organization, both because the organization is likely to have more money available to it and because the sentence for an organization obviously cannot include a term of imprisonment.

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[236] 18 U.S.C. 1426; 18 U.S.C. 1546.
[237] 18 U.S.C. 1019.
[238] 18 U.S.C. 2113(a).
[239] 18 U.S.C. 2114.
[240] 18 U.S.C. 1726; 18 U.S.C. 1912.
[241] 18 U.S.C. 1361.
[242] 18 U.S.C. 41.
[243] 18 U.S.C. 645.
[244] 18 U.S.C. 646.

The fine levels in subsection (b) for felonies and misdemeanors committed by individuals and for felonies committed by organizations, are considerably higher than the levels provided in S. 1437 as passed by the Senate in the 95th Congress. In addition, subsections (b)(1)(A) and (b)(2)(A) were amended in the 96th Congress to provide the same maximum fine for a misdemeanor that results in the loss of life as for a felony. These amendments are designed to offset the deletion in the 96th Congress of section 2201(c) in S. 1437, which provided that, as an alternative to the maximum fines set forth in subsection (b), "[a] defendant who has been found guilty of an offense through which pecuniary gain was directly or indirectly derived, or by which bodily injury or property damage or other loss was caused, may be sentenced to pay a fine that does not exceed twice the gross gain derived or twice the gross loss caused, whichever is the greater." The business community expressed concerns that the standard for determining the amount of a fine under that provision could result in an unwieldy sentencing proceeding that would be virtually equivalent to a trial on the question of damages. The Committee concluded that an increase in the maximum fine levels for serious offenses could assure that a fine could be imposed that would usually reach the defendant's illgotten gains while avoiding undue complexity in the sentencing hearing. Of course, in a situation in which, for example, the defendant obtained millions of dollars in the course of committing an offense, the provisions for an order of restitution or an order of notice to victims may be used, depending on the circumstances, in conjunction with a fine to assure that a convicted defendant cannot keep what he obtained.

It is intended by the Committee that the increased fines permitted by this section will help materially to penalize and deter white collar crime and other highly profitable crime. Certainly no correctional aims can be achieved where the maximum sentence imposable is set at such a low level that it can be regarded merely as a cost of doing business—a cost that may in fact be more than offset by the gain from the illegal method of doing business. The need for such increased penalties is particularly apparent with regard to a corporate defendant which today can often divide the minor burden of payment among its many stockholders, or pass it on to consumers as a cost of doing business, with the result that lesser penalties may not be felt either by the corporation or by its multiple owners.

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[245] See discussion of proposed 18 U.S.C. 3559(b).

[246] Such substantially higher fine levels were recommended by, inter alia, the Committee on Reform of Federal Criminal Laws of the American Bar Association, Subcommittee Criminal Code Hearings, Part VII, 5817.

[247] McKinney's N.Y. Crim. Law § 400.30 (1969).

While the Committee believes that the increased fine levels will be of particular importance in the white collar crime area, it does not mean to imply that fines are not an important aspect of sentencing in other areas as well. It is hoped that the sentencing provisions will lead to more creative use of sentencing options such as, for example, the use of a sentence to pay a fine in installments over a period of time for minor offenders who may not be able to pay a fine in a lump sum. Such a sentence would be appropriate, for example, in the case of a defendant without current assets who is convicted of a minor offense that does not warrant imprisonment but that nevertheless must be met by some clear form of punishment and deterrence.

SECTION 3572. IMPOSITION OF A SENTENCE OF FINE

1. In general

Section 3572 sets out factors that the court must consider in imposing a fine, specifies the degree to which a sentence to pay a fine is final, places a limit on the aggregation of multiple fines, provides that the court may specify the time and method of payment of the fine, precludes the imposition of an alternative sentence to be served if an imposed fine is not paid, provides notice that agents of an organization who are authorized to disburse its assets are individually responsible for payment from the funds of the organization of the fine assessed against it, and provides that a fine imposed on an agent or shareholder of an organization may not be paid from the assets of the organization, unless expressly permissible under applicable State law.

2. Present Federal law

The provisions of this section generally are not the subject of any current Federal statutes, although imprisonment in lieu of the payment of a fine is inferentially authorized.[248]

3. Provisions of the bill, as reported

Subsection (a), by cross-reference to section 3553(a), specifies the factors to be considered by the court in determining whether to impose a fine, and in determining its amount, the time for payment, and the method of payment. As is the case with regard to other potential sanctions, the court is required to consider the nature and circumstances of the offense and the history and characteristics of the defendant, the purposes of sentencing with regard to which a fine may be an appropriate response, and the guidelines and any policy statements which may be applicable. Use of the qualifier "to the extent that they are applicable" in referring to the four stated purposes of sentencing is intended as recognition that a fine may often be a highly useful means of providing just punishment and of deterring others from engaging in like offenses—particularly offenses affording the opportunity for monetary gain—while the other purposes of sentencing would less commonly be served by a sentence to pay a fine.

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[248] See 18 U.S.C. 3565. But see *Tate* v. *Short*, 401 U.S. 395 (1971); *Williams* v. *Illinois*, 399 U.S. 235 (1970)

In considering the characteristics of the defendant, the court is specifically required to consider the ability of the defendant to pay a fine in the amount and manner contemplated in view of the defendant's income, earning capacity, and financial resources, and, if the defendant is an organization, the size of the organization. The court is also required to consider the burden that the fine will place on the defendant and on his dependents, any payment of restitution by the defendant or any requirement that the defendant make reparation to the victim, the impact of the fine on the future financial stability of the defendant, any effort by an organizational offender to discipline the persons responsible for the offense or ensure against recurrence of the offense, and any other equitable considerations that are pertinent.

The maximum fine levels are sufficiently high to permit considerable flexibility in tailoring the fine level to the situation in a particular case. While it is not intended that a fine for a solvent individual be so high as to force him into a lifetime of poverty, if a defendant is wealthy and the court finds that a high fine is necessary to serve the purposes of sentencing, it should not be reluctant to sentence the defendant to pay a high fine. On the other hand, the court need not avoid the use of a sentence to pay a fine against an individual who is not wealthy since the bill would permit installment payment of a fine. In some cases, the most appropriate sentence might be, for example, the payment of a fairly substantial fine in installments of a specified amount out of each pay check over a period of time.

The requirement that the court, in assessing the ability of a defendant to pay a fine, consider any payment of restitution by the defendant or any requirement that the defendant make restitution to the victims of the offense is not intended necessarily to result in the court's avoiding imposition of a fine that might otherwise be imposed or reducing a fine by the amount of restitution to be paid. Either of these results might, however, be appropriate in a particular case, depending upon the effect of payment of restitution upon the defendant's ability to pay a fine and upon the purposes of sentencing to be served by requiring payment of a particular fine. Of course, if the defendant has, prior to sentencing made reparation or made arrangements to make reparation to the victims of his offense, this will have an effect on his financial resources which should be taken into account in assessing the ability of the defendant to pay a fine, and may also alleviate somewhat the need to impose a high fine for purposes of punishment and deterrence.

The considerations in setting fine levels can obviously be quite complex, and they warrant careful attention by the Sentencing Commission in formulating sentencing guidelines and policy statements to aid in imposing sentence.

Subsection (b) was included for the first time in S. 1630 in the 97th Congress. It provides that, unless otherwise expressly permitted, the aggregate of fines that may be imposed on a defendant at the same time for offenses that arise from a common scheme or plan and that do not cause separable or distinguishable kinds of harm or damage, is twice the amount imposable for the most serious offense. The provision was added in response to concerns that there might be some offenses, particularly regulatory offenses, where an ongoing pattern of conduct constituted numerous minor offenses, with the result that the defendant might be subject to an unjustifiably high maximum fine.

Subsection (c) makes clear that, even though a fine imposed by the sentencing judge may be modified or remitted pursuant to section 3573, corrected pursuant to section 3742, or appealed and modified pursuant to section 3742 if it is outside the guidelines, the judgment of conviction that includes a fine is final for all other purposes. This notes the provisional nature of the sentence pending any later modifications authorized by the bill while making clear that the conviction is otherwise final.

Subsection (d) permits the court to authorize payment within a specified period of time or in installments. Such flexible payment schedules are now specifically authorized in the Federal system for a fine imposed as a condition of probation,[249] and are authorized in many States.[250] Clearly, if the defendant can earn the money to pay a certain fine over a period of time, there seems little justification for choosing imprisonment or a lesser fine if the higher fine would otherwise be clearly the most appropriate sentence.

Subsection (e) prohibits imposition, at the time the sentence to pay a fine is imposed, of an alternative sentence to be served if the fine is not paid. If the defendant fails to pay his fine, the court may determine the remedy after the nonpayment and after an inquiry into the reasons for it.[251] If, for example, nonpayment has occurred because changes in the defendant's financial circumstances have made payment an undue financial burden, it may be necessary to adjust the amount of the fine pursuant to the provisions of section 3573. If, on the other hand, the defendant is able to pay the fine but chooses to ignore his legal obligation to pay it, the provisions of proposed subchapter B of chapter 229 regarding collection of fines may be utilized to collect the fine.

Subsection (f) specifies that, if an organization is fined, it is the duty of each of the organization's employees or agents who is authorized to make disbursement of the organization's assets to pay the fine from organization assets. This provision is designed to assure that a corporation will not be able to escape or delay liability by means of obfuscating the nature of its structure.[252] The subsection also precludes the payment of a fine imposed on an agent or shareholder of an organization from assets of the organization unless such payment is expressly permissible under applicable State law. The purpose of the exception is simply to recognize that the governing of internal corporate operations is appropriately a matter for the law of the State of incorporation. Most States, the

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[249] 18 U.S.C. 3651.

[250] National Commission on Reform of Federal Criminal Laws, II *Working Papers* 1285 (1970).

[251] This is in opposition to the existing statute, 18 U.S.C. 3565, but in line with constitutional requirements. See *Williams* v. *Illinois, supra* note 248. There is no constitutional prohibition against imposing a new sentence, including a sentence to imprisonment in some circumstances, in the event a fine is not paid, even if the non-payment is without fault on the defendant's part, see *Bearden* v. *Georgia*, —U.S.—(decided May 24, 1983), but the Committee has not incorporated such a procedure into the provisions of this bill.

[252] The Committee had considered including specifically in this subsection a reference both to the disbursing officers of the organization and "their superiors." It was decided, however, that such a reference to "superiors" would be redundant since whatever authority a disbursing officer or cashier would have, would also be within the authority of every individual from his immediate superior through the chief executive officer.

Committee understands, carefully circumscribe indemnification for fines. The term "expressly permissible" is intended to distinguish between situations in which State statutes or court decisions authorize indemnification and those in which State law prohibits it or is silent. The court's finding is to extend only to that issue. If indemnification is authorized, State law governs the manner of determining whether it is proper in a particular case.

SECTION 3573. MODIFICATION OR REMISSION OF FINE

1. In general

Section 3573 provides the flexibility necessary to accommodate changes in the financial condition of a defendant. Since section 3572 specifies that the ability of a defendant to pay is relevant to the amount of a fine, a modification or remission of the fine should be available when that ability changes. The court is thus equipped to adjust the fine of the well-intentioned defendant in order to avoid creating unjustifiable impoverishment. An unexcused failure to pay a fine, however, may be prosecuted as any other criminal contempt.[253]

2. Present Federal law

There is no counterpart to this section in existing Federal law; as previously noted, the current statute permits a judgment in a criminal case to require imprisonment until the fine is paid.[254]

3. Provisions of the bill, as reported

Subsection (a) permits a defendant who has been sentenced to pay a fine to petition the court for changes in the terms of payment or remission of all or part of the fine in specified circumstances. Under paragraph (1), if a defendant has paid part of a fine and if the circumstances that justified imposition of the fine in a particular amount or payment by a particular time or method have changed, the defendant may petition the court for modification of the method of payment, remission of all or part of the unpaid portion of the fine, or a change in the time or method of payment. The provision recognizes that the defendant's circumstances may change in a way that causes the amount or method of payment of a fine to become too harsh to serve the purposes of sentencing fairly. Paragraph (2) permits a defendant who has voluntarily made restitution to the victim of his offense after a fine was imposed to petition the court for a reduction of the fine in an amount not exceeding the amount of restitution. This provision places the defendant who voluntarily makes restitution after a fine is imposed on the same financial footing as the defendant who voluntarily makes restitution before sentencing or who is ordered to make restitution as part of his sentence.[255]

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[253] See 18 U.S.C. 402. It should also be pointed out that the unexcused failure to pay a fine in the time and manner specified may, if payment was made a condition of probation, result in a revocation of probation and the imposition of any other sentence that originally was available. See proposed 18 U.S.C. 3563(b)(2) and 3565(a)(2).

[254] 18 U.S.C. 3565.

[255] Proposed 18 U.S.C. 3572(a)(3).

Subsection (b) permits the judge to enter an appropriate order if the circumstances warrant relief. Of course, the considerations set forth in section 3572(a) for the setting of the initial fine and its time and method of payment are equally applicable to a determination whether a remission of the fine or a change in the time or method of payment is warranted.

These provisions allow the reasonable implementation of the underlying principles of this chapter, as suggested by the American Bar Association,[256] the Model Penal Code,[257] and several State statutes.

SECTION 3574. IMPLEMENTATION OF A SENTENCE OF FINE

Section 3574 notes that implementation of a sentence to pay a fine is governed by the procedures outlined in subchapter B of chapter 229 of title 18. Full discussion of these procedures is contained in the report on that subchapter.

SUBCHAPTER D—IMPRISONMENT

(Sections 3581-3586)

Proposed subchapter D of chapter 227 of title 18, United States Code, sets forth the basic considerations governing the imposition of sentences of imprisonment. It creates the frame of reference used throughout the sentencing provisions to determine the maximum sentence that may be imposed for each offense. It deals specifically with the terms of imprisonment and supervised release authorized for the various grades of offenses; criteria for imposing such sentences; collateral aspects of sentences of imprisonment; operation of multiple sentences; and calculation of terms of imprisonment.

SECTION 3581. SENTENCE OF IMPRISONMENT

1. In general

Section 3581 provides that a defendant convicted of an offense may generally be sentenced to a term of imprisonment, establishes the classes of offenses, and specifies the maximum authorized term of imprisonment for each class.

2. Present Federal law

Present Federal criminal law, which has grown by sporadic addition and deletion, has resulted in there being authorized in current title 18 at least seventeen levels of confinement, ranging from life imprisonment to thirty days. By combining imprisonment and fine variations, some seventy-five different punishment levels may be isolated. Comparison of punishment provisions for particular offenses leads to the exposure of numerous apparent inconsistencies.

In addition to the sentencing provisions found in the text of each individual criminal statute there are two generally applicable special offender sentencing provisions in current law.[258] These two provisions allow a term of imprisonment "for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law" for a special offender in certain clearly defined instances. Both require notice and a hearing with rights of counsel, confrontation, and compulsory process if application of the special offender sentence is sought by the prosecutor, and a sentence pursuant to the provisions may be appealed by the defendant or the government.[259]

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[256] ABA Standards Relating to the Administration of Justice, Sentencing Alternatives and Procedures, § 18-7.4 (1979).

[257] Model Penal Code § 302.3 (P.O.D. 1962).

[258] 18 U.S.C. 3575 and 21 U.S.C. 849.

A defendant sentenced to a term of imprisonment in excess of one year is eligible for release on parole during at least the last two-thirds of the sentence. The time at which a prisoner is eligible for release on parole is determined pursuant to the provisions of 18 U.S.C. 4205, which provides three possible actions by the sentencing judge that will affect a convicted defendant's parole eligibility date. First, if the judge specifies no parole eligibility date, a prisoner sentenced to a term of imprisonment that exceeds one year will be eligible for parole under 18 U.S.C. 4205(a) after serving one-third of the term or ten years, whichever is less. Second, under 18 U.S.C. 4205(b)(1), the judge may specify a time for parole eligibility that occurs before the time that would apply under 18 U.S.C. 4205(a). Third, under 18 U.S.C. 4205(b)(2), the judge may specify that the defendant will be immediately eligible for parole, and specify only the maximum term of imprisonment.[260]

In addition, the Parole Commission has in recent years used parole guidelines that recommend an appropriate length of time to be spent in prison by a defendant who was convicted of a particular crime and who has a particular history and characteristics.[261]

As presently structured, the laws concerning the imposition of a term of imprisonment and the determination of a date for parole eligibility often are not only incompatible but also work to promote disparity and lack of certainty in the criminal justice system. If a sentencing judge wishes to assure that he has a high degree of control over the time a defendant will actually spend in prison, he must not only determine what that period of time is, but must also evaluate the effect that the parole eligibility statute and the parole guidelines will have on the sentence that he imposes. If, for example, a judge believes that a defendant should spend 20 months in prison, less good time, for a robbery offense that carries a maximum term of imprisonment of 15 years,[262] committed under mitigating circumstances, he could achieve that result under current law by sentencing him to exactly 20 months imprisonment, but could achieve the result only because the existing parole guidelines do not recommend parole during such a short period. If, instead, he tried to achieve that result by sentencing the defendant to 60 months in prison, with eligibility for parole in one-third that time pursuant to 18 U.S.C. 4205(a), in the belief that most prisoners are released on parole at their parole eligibility date, the result would probably be that the defendant would spend at least 24 months in prison, the lowest period provided for robbery in the parole guidelines. Only if the Parole Commission agreed with the judge that there were particular mitigating circumstances not taken into account in the guidelines would the defendant serve the length of time that the judge intended.[263] On the other hand, if the judge thought the defendant should spend five years in prison, he would have to sentence the defendant to a 15-year term without early parole eligibility in order to assure that operation of the parole guidelines would not result in an earlier release from prison than the judge intended.[264] If the judge thought the defendant should serve seven years in prison, he could not control that result at all; such a sentence exceeds any period recommended in the parole guidelines for the offense of robbery (except for multiple offenses) and exceeds any period for which the judge could make the defendant ineligible for parole.

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[259] See *United States* v. *DiFrancesco*, 449 U.S. 117 (1980); *United States* v. *Neary*, 552 F.2d 1184 (7th Cir. 1977); *United States* v. *Stewart*, 531 F.2d 326 (6th Cir. 1976); *United States* v. *Ilacqua*, 562 F.2d 399 (6th Cir. 1977), cert. denied, 435 U.S. 906 (1978).

[260] In addition to the parole eligibility provisions for regular adult offenders, current law contains a number of specialized parole eligibility requirements. Those for youth offenders and young adult offenders included in 18 U.S.C. 5017 specify that a defendant sentenced to imprisonment under one of those provisions is eligible for parole immediately and must be released on parole at least two years before expiration of sentence, and those relating to persons sentenced under title II of the Narcotic Addict Rehabilitation Act in 18 U.S.C. 4254 specify parole eligibility after six months.

[261] The parole guidelines appear in 28 CFR § 2.20.

[262] See, e.g., 18 U.S.C. 2111 and 2112.

Thus, sentencing judges and the Parole Commission second-guess each other, often working at cross-purposes. The argument that early release on parole should be retained to help alleviate judicial sentencing disparity fails to take into account the fact that it is the very availability of such release that helps to create that disparity. The judges are attempting to apply their individual sentencing philosophy to control the true sentence of the defendant, while the Parole Commission is attempting to alleviate the resulting disparity. Obviously neither is successful under current law. The problem is compounded by the fact that the judges do not generally state reasons for their sentences or the lengths of time they believe defendants should actually spend in prison, effectively precluding the Parole Commission from evaluating the judges' views, to the extent it might find them pertinent, as to the influencing factors in particular cases.

3. Provisions of the bill, as reported

Proposed 18 U.S.C. 3581(a) states the general rule that all individual offenders, regardless of the type of offense committed, may be sentenced to a term of imprisonment.[265] This differs slightly from the approach taken by the National Commission in that the Commission's sentencing provisions did not provide for imprisoning persons committing the lowest class of offenses.[266] The Committee is of the belief that a very short term (five days) of imprisonment is appropriate for some offenders who are found to have committed infractions since, inter alia, the shock value of a brief period in prison may have significant special deterrent effect.

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[263] It should be noted that even if the defendant who was sentenced to 60 months in prison had been made eligible for parole either at a designated time less than one-third the sentence or immediately upon commencement of sentence pursuant to 18 U.S.C. 4205(b), the application of the parole guidelines to the defendant usually would not be altered regardless of the judge's (usually unstated) purpose in specifying early parole eligibility.

[264] While the parole guidelines do provide that the worst two groups of offenders who commit robbery should spend from 48 to 72 months in prison, the Parole Commission's conclusions as to which prisoners would fall within those groups might differ from those of the sentencing judge.

[265] That rule is subject to limited exceptions. If an offense is not punishable under current law by a term of imprisonment, it will not be punishable by imprisonment under proposed 18 U.S.C. 3559.

[266] National Commission Final Report, *supra* note 1, § 3201.

Subsection (b) sets forth nine classes of offenses.[267] There are five felony classes with authorized terms of imprisonment ranging from life imprisonment to three years; three misdemeanor classes with maximum terms ranging from one year to thirty days; and the aforementioned infraction category carrying a maximum of five days. This categorization of offenses accords fairly closely with the range and number of categories adopted in several recent State codifications, and, except for the addition of a three-year felony and a six-month misdemeanor, accords closely with the recommendation of the National Commission.[268]

It must be remembered that the terms set forth are the maximum periods for which a judge is authorized to sentence an offender in each such category; they represent the Committee's judgment as to the greatest period the Congress should allow a judge to impose for an offense committed under the most egregious of circumstances. It should also be remembered that the Sentencing Commission will be promulgating guidelines that will recommend an appropriate sentence for a particular category of offender who is convicted of a particular category of offense and that the guidelines would reserve the upper range of the maximum sentence for offenders who repeatedly commit offenses or those who commit an offense under particularly egregious circumstances.[269] It is expected, for example, that the ordinary sentence imposed for a Class C felony will be considerably less than the twelve-year maximum authorized. This subsection is designed simply to provide a maximum limit on the broad range within which the Sentencing Commission and the judges are to operate. The subsection is no more intended to indicate the actual sentence a judge is expected to impose in each case than are the analogous provisions of current Federal statutes that also customarily set forth only the maximum limit on the judge's discretion. Further, for the first time in Federal criminal law, the sentencing judge will be sentencing within the maximum permissible term of imprisonment after consideration of sentencing guidelines that will recommend the top of the possible sentencing range only for the most egregious cases, and the defendant will be able to obtain appellate review of the sentence if it exceeds the guideline range applicable to him.[270]

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[267] Proposed 18 U.S.C. 3559 specifies how these grades apply to offenses that specify a maximum term of imprisonment rather than a grade.

[268] The National Commission in its Final Report proposed generally higher terms of imprisonment for felonies since it retained parole; it proposed a supergrade category of felony permitting life imprisonment (§ 3601); three other classes of felonies, entailing imprisonment for thirty, fifteen and seven years (§§ 3002(1); 3201 (1)); two categories of misdemeanors, carrying one year of imprisonment and thirty days' imprisonment (§§ 3002 (2); 3201 (2)); and one infraction category (§ 3002 (3)). Under the Commission's proposed formulation, with the lowest felony carrying a maximum of seven years, many offenses presently carrying two to five years maximum prison terms would either have to be upgraded to six-year felonies or reduced to one-year misdemeanors. To avoid a six-fold jump in potential penalty between one offense category and the next higher category, the Committee felt it appropriate to include a three-year felony, in accord with the recommendation of the cognizant committee of the American Bar Association that there not be a gap in possible maximum sentences from a one-year maximum to a maximum several times as high. Subcommittee Criminal Code Hearings, Part VII, at 5816. Similar considerations dictated the inclusion of a six-month misdemeanor.

[269] Proposed 28 U.S.C. 994(h) requires that the guidelines specify a sentence at or near the maximum provided in proposed 18 U.S.C. 3581(b) for a third conviction of a crime of violence or drug trafficking offense. Proposed 28 U.S.C. 994(i) requires that the guidelines specify a substantial term of imprisonment for other specific categories of very serious offenses. See Subcommittee Criminal Code Hearings, at Part XI, at 7814 (statement on behalf of the National League Aid and Defenders' Association); ABA Standards Relating to Sentencing Alternatives and Proceedings, § 18-2.1(e) (Second Edition Tentative Draft 1979).

A sentence imposed by a judge pursuant to section 3581 will represent the actual period of time that the defendant will spend in prison, except that a prisoner, after serving one year of his term of imprisonment, may receive credit at the end of each year of up to 36 days per year toward service of his sentence if he satisfactorily complies with the institution's rules.[271] The use of such "determinate" sentences, as noted earlier, represents a substantial departure from the sentencing philosophy on which current law is based. At the time the original parole statutes were drafted a judicial sentence was to represent only the maximum term that a defendant was to remain incarcerated, and the role of the Parole Commission was to determine when in the course of that incarceration the defendant had become sufficiently rehabilitated to be safely returned to society. While—for the reasons stated previously—the rehabilitation model is no longer the basis of the parole release decision, the theory on which it is based still pervades the existing Federal sentencing statutes. Under current law, if a judge sentences a defendant to a term of imprisonment that exceeds one year in length, that sentence will always result in the prisoner's being eligible for parole after serving one-third of the term, or less if the judge so specifies. In no case can the judge specify that, for example, a defendant should serve two years in prison and then be released for a transitional period of supervision. This is true even though logically the attributes of the entire sentence could be set at the time of sentencing—the factors routinely considered today by the Parole Commission in setting release dates[272] relate entirely to information known at the time of sentencing.[273]

The Committee is of the view, in light of the reasons that have been reviewed previously, that the indeterminate sentence no longer has a role to play in the context of a guideline sentencing system. The guideline sentencing system must totally supplant the indeterminate sentencing system in order to be successful. Accordingly, all sentences to imprisonment under the new system are determinate.

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[270] See proposed 18 U.S.C. 3742. There are two specialized provisions for appellate review of a sentence in current law: 18 U.S.C. 3576, relating to review of a sentence as a dangerous special offender, and 21 U.S.C. 849(h), relating to review of a sentence as a dangerous special drug offender.

[271] See proposed 18 U.S.C. 3624(b).

[272] The "salient factor score" set forth in 28 C.F.R. § 2.20, provides for consideration by the Parole Commission, in determining whether and when to release a prisoner on parole, of the number of prior adult or juvenile convictions and incarcerations of more than 30 days, the age at time of committing the current offense, recent period free of incarceration, whether the defendant was on parole or probation, or in confinement or escaped, at the time the offense was committed, and any history of heroin or opiate dependence.

[273] Only in some of those cases in which a hearing examiner sets a parole release date outside the Parole Commission guidelines, or in which a prisoner has a record of serious institutional rules violations, or in which there has been superior program achievement, may factors not known at the time of sentencing affect the release date. Hoffman and DeGostin, *Parole Decision Making: Structuring Discretion*, United States Board of Parole Research Unit, Report 5, Table II, at 11 (June 1974), set out in the Subcommittee Criminal Code Hearings, Part XIII, at 9217. In addition, 28 C.F.R. § 2.6 provides that, "[w]hile neither a forfeiture of good time nor a withholding of good time shall bar a prisoner from receiving a parole hearing, Sec. 4206 of Title 18 of the United States Code permits the Commission to parole only those prisoners who have substantially observed the rules of the institution."

It is the expectation of the Committee that determinate sentences imposed under this new sentencing system will not, on the average, be materially different from the actual times now spent in prison by similar offenders who have committed similar offenses. Logic and reason on the part of the Sentencing Commission, as reviewed and accepted by the Congress, will control the length of the recommended terms, but historical averages will be examined during their development.[274] There will be some logical changes from historical patterns, of course, as in the case of serious violent crimes or white collar offenses for which plainly inadequate sentences have been imposed in the past, and in the case of minor offenses for which generally inappropriate terms of imprisonment have been imposed in the past, but for the most part the average time served should be similar to that served today in like cases. Certainly the guidelines will remove from the criminal justice system the artificially high terms of imprisonment that are imposed today to take into account the effects of the parole laws on the time the defendant will serve. Both the offender and society will benefit.[275]

SECTION 3582. IMPOSITION OF A SENTENCE OF IMPRISONMENT

1. In general

This section specifies the factors to be considered by a sentencing judge in determining whether to impose a term of imprisonment and, if a term is to be imposed, the length of the term. The section also provides that, if a term of imprisonment is imposed, the judge may recommend a type of prison facility suitable for the defendant. The section also makes clear that a judgment of conviction is final even though the sentence is provisional in that it may be modified, corrected, or appealed, and describes the circumstances under which the term of imprisonment may be modified.

2. Present Federal law

At present there are no general Federal statutes prescribing factors that a judge must consider in deciding whether to sentence a defendant to a term of imprisonment and, if so, how long that term of imprisonment should be.

In addition, as noted before, the sentencing judge has very limited control under current law over the question of how long a defendant will actually spend in prison. The defendant whose sentence is more than a year long is eligible for release on parole by operation of law after serving one-third of the term of imprisonment or ten years, whichever is less,[276] unless the judge has specifically made him eligible for parole at an earlier time [277] or immediately upon commencement of service of sentence.[278] The law contains no statement concerning when the judge should specify early or immediate eligibility for parole. It also does not permit the judge in any case in which the term of imprisonment exceeds one year to make the defendant ineligible for parole for a longer period than one-third of his term of imprisonment.

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[274] See proposed 28 U.S.C. 994(m).

[275] The Sentencing Commission is required to take into account, inter alia, the nature and capacity of the existing penal and correctional facilities and services, as well as the purposes of sentencing, when it promulgates the sentencing guidelines. Proposed 28 U.S.C. 994(g). This requirement itself will help to avoid any unintended change in the actual median time spent in prison by Federal prisoners.

[276] 18 U.S.C. 4205(a).

[277] 18 U.S.C. 4205(b)(1).

[278] 18 U.S.C. 4205(b)(2).

There are several specialized sentencing statutes that provide some statutory guidance concerning the factors to be considered in imposing a sentence under their provisions. These statutes relate to dangerous special offenders, dangerous special drug offenders, youth and young adult offenders, and drug addicts.

Detailed criteria for a sentence to a term of imprisonment longer than that which would ordinarily be provided for many felonies are provided in 18 U.S.C. 3575 for "dangerous special offenders" and in 21 U.S.C. 849 for "dangerous special drug offenders." The criteria for the two classes of offenders are parallel, except that the dangerous special offender provisions may apply to any felony if the criteria are met, while the dangerous special drug offender provisions apply only to felonies involving controlled substances. In order for the dangerous special offender or dangerous special drug offender sentencing provisions to apply to a defendant, he must be found to be both "dangerous" and a "special" offender because he fits one of three classifications set forth in the statute. A defendant is considered "dangerous" if a period of confinement for a felony that is longer than the maximum provided in the statute defining the felony "is required for the protection of the public from further criminal conduct by the defendant".[279]

The dangerous special offender provisions apply to an offender who (1) was previously convicted of two or more separate felonies, and has either been convicted of the last one within five years of the current offense or been released from prison, on parole or otherwise, on one of the offenses within the past five years; (2) committed the charged felony as part of a pattern of criminal conduct which generated a substantial source of his income and in which he manifested special skills or expertise; or (3) committed the felony as part of, or in furtherance of, a conspiracy with three or more other persons in which the offender played or had agreed to play a leadership role, or in which he used, or had agreed to use, bribery or force. The classifications of dangerous special drug offenders are substantially the same, except that they relate only to persons charged with controlled substances felonies, and where the characterization of the offense is dependent on previous convictions, these convictions are for felonies involving controlled substances. Under either statute, the applicability to the defendant of the special offender classification must be established by a preponderance of the information, including information from the trial, the sentencing hearing, and the presentence report.

The Federal Youth Corrections Act[280] provides that a person who is under 22 years of age at the time of conviction may be sentenced under the Act under specified circumstances. Section 5010(d) of title 18 provides that a youth offender may be sentenced to a regular adult sentence if the court finds that he "will not derive benefit from treatment" under the Act. This provision has been interpreted by the Supreme Court to require that the sentencing court consider whether to sentence a youth offender pursuant to the Act but not to require that the court state reasons for deciding that it will or will not impose sentence under the Act.[281] If the court does sentence a youth offender under the Act, it may either sentence him to an indeterminate sentence for purposes of "treatment and supervision" [282] or, if it finds "that the youth offender may not be able to derive maximum benefit from treatment * * * prior to the expiration of six years," may sentence him to the custody of the Attorney General "for treatment and supervision" pursuant to the provisions of the Federal Youth Corrections Act to any "further period that may be authorized by law for the offense or offenses."[283]

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[279] 18 U.S.C. 3575(f); 21 U.S.C. 849(f).

[280] 18 U.S.C. 5001 et seq.

In both cases, the defendant is immediately eligible for parole.[284] In the case of an indeterminate sentence pursuant to 18 U.S.C. 5010(b), the defendant may spend no more than four years in prison and must be discharged unconditionally from supervision on or before six years from the date of his conviction.[285] If he is sentenced pursuant to 18 U.S.C. 5010(c) to a sentence that would apply to a regular adult offender, the defendant must be released on parole at least two years before the expiration of his sentence and must be released from supervision by the expiration of his term.[286]

If a defendant is a "young adult offender" between the ages of 22 and 26 at the time of conviction, the judge may, after considering his previous criminal record and record of juvenile delinquency, his background and capabilities, his physical and mental health, and "such other factors as may be considered pertinent," sentence him pursuant to the Federal Youth Corrections Act if he finds "that there are reasonable grounds to believe that the defendant will benefit from treatment" under the Act.[287] Unlike cases involving offenders under the age of 22,[288] the sentencing judge is not required to consider imposing sentence pursuant to the Federal Youth Corrections Act; rather, the sentencing judge has the option of imposing sentence pursuant to that Act in his discretion.

Finally, title II of the Narcotic Addict Rehabilitaion Act [289] provides that, if the court finds that an "eligible offender"[290] is an addict and "is likely to be rehabilitated through treatment," the court must sentence the defendant to the custody of the Attorney General for treatment unless the Attorney General certifies that adequate facilities and personnel for such treatment are not available.[291] Such a commitment is for an indeterminate period of up to ten years, but not "to exceed the maximum term of imprisonment" applicable to the offense. The defendant may be released on parole at any time after six months of treatment if the Attorney General recommends such release to the Board of Parole and the Surgeon General certifies "that the offender has made sufficient progress to warrant his conditional release under supervision."[292]

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[281] *United States* v. *Dorszynski,* 418 U.S. 424 (1974).

[282] 18 U.S.C. 5010(b).

[283] 18 U.S.C. 5010(c).

[284] 18 U.S.C. 5017(a).

[285] 18 U.S.C. 5017(c).

[286] 18 U.S.C. 5017(d).

[287] 18 U.S.C. 4216.

[288] See *United States* v. *Dorszynski, supra* note 281, which requires the judge to find that an offender under the age of 22 will receive no benefit from sentencing under the Youth Corrections Act, but does not require that the judge state reasons for his conclusion.

[289] 18 U.S.C. 4251 et seq.

[290] "Eligible offender" is defined in 18 U.S.C. 4251(f) to include any individual convicted of an offense against the United States except an individual whose conviction is for a crime of violence, or whose conviction is for trafficking in narcotic drugs (unless the offense was committed primarily to support the defendant's addiction), or against whom a felony charge is pending, or who is on probation or parole, or who has been convicted of a felony on two or more prior occasions, or who has previously been committed for narcotic addiction on three or more occasions.

3. Provisions of the bill, as reported

For the first time under Federal criminal law, a court would be required, pursuant to section 3582(a), to consider specified factors prior to the imposition of a sentence of imprisonment[293] in all cases in which a defendant was convicted of a Federal offense. The court must consider, to the extent that they are applicable,[294] the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to provide just punishment, a deterrent effect, incapacitation, and an opportunity for rehabilitation; and the guidelines and any policy statements of the Sentencing Commission that are applicable. While judges generally consider offense and offender characteristics in determining the type and length of sentence to be imposed under current law, the listing of the factors to be considered serves to focus attention on the specific purposes of the sentencing process and to assure that adequate emphasis is given to each. Again, it should be noted that there will be cases in which incarceration would be appropriate to serve only one or two of the listed purposes of sentencing; nevertheless, if imprisonment is found to be justified for any one of the purposes, except as noted below, its imposition is authorized under this section. In such a case, whether it should be imposed when authorized is a question to be resolved after balancing all the relevant considerations.

Subsection (a) specifies, in light of current knowledge, that the judge should recognize, in determining whether to impose a term of imprisonment, "that imprisonment is not an appropriate means of promoting correction and rehabilitation." This caution concerning the use of rehabilitation as a factor to be considered in imposing sentence is to discourage the employment of a term of imprisonment on the sole ground that a prison has a program that might be of benefit to the prisoner. This does not mean, of course, that if a defendant is to be sentenced to imprisonment for other purposes, the availability of rehabilitative programs should not be an appropriate consideration, for example, in recommending a particular facility.

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[291] 18 U.S.C. 4253(a).

[292] 18 U.S.C. 4254.

[293] The factors are required to be considered in determining whether a term of imprisonment should be imposed, in determining the appropriate length of any such term, and in determining whether it should be followed by a period of supervised release. The court is also required to consider policy statements issued by the Sentencing Commission in deciding whether to make a recommendation as to the appropriate type of prison facility for the defendant. See proposed 18 U.S.C. 3621(b).

[294] The phrase "to the extent that they are applicable" acknowledges the fact that different purposes of sentencing are sometimes served best by different sentencing alternatives.

The Committee believes that the guidelines provide an appropriate means for embodying the same considerations which are contained in current dangerous special offender statutes. Two provisions in the directives to the Sentencing Commission are designed to be used in their place. First, under proposed 28 U.S.C. 994(i), the Sentencing Commission is specifically directed to assure that the sentencing guidelines require a substantial term of imprisonment for categories of defendants in which the defendant has an extended criminal history, is a career criminal, or is engaged in racketeering in a managerial or supervisory capacity, or committed a violent felony while on release pending trial, sentence, or appeal from another felony charge or conviction. Second, proposed 28 U.S.C. 994(h) requires the sentencing guidelines to specify a term of imprisonment at or near the statutory maximum for a third conviction of a felony that involves a crime of violence or drug trafficking.

The bill, as reported, also drops the special sentencing provisions for youth offenders, young adult offenders, and drug addicts. Under the bill, as reported, the Sentencing Commission is required to consider what impact, if any, such characteristics of the defendant as his age and his physical condition, including drug dependence, should have on the appropriate sentence.[295] By including such considerations in the formulation of sentencing guidelines, uniform treatment of the characteristics for all defendants similarly situated will be promoted. In addition, the converse situation is also recognized; the bill places in 28 U.S.C. 994(j) a recognition that a young first offender, who has not committed a serious crime, ordinarily should not receive a sentence to imprisonment. The Committee believes that this approach to such factors as youth is far preferable to the approach in current law. While the Bureau of Prisons has found that it is better from the standpoint of both prisoners and the criminal justice system to have prisoners in different age groups in the same institution, providing separate wings within an institution for youthful offenders, some courts have recently held that the Youth Corrections Act requires that offenders sentenced under the Act must be housed in a manner that separates them entirely from adult offenders.[296] The Bureau of Prisons thus provides three separate institutions for these offenders despite its misgivings concerning the wisdom of doing so, both because the limited number of institutions for such offenders causes most of them to be incarcerated far from home and because an institution containing only youthful offenders tends to have more discipline problems than one with a variety of age groups.[297] The Committee shares these concerns and believes that these provisions should be deleted. The directive to the Sentencing Commission contained in proposed 28 U.S.C. 994(d) to consider the effect that age should have on sentences is sufficient to assure such specialized treatment as is desirable for this category of offenders.

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[295] Proposed 28 U.S.C. 994(d).

[296] *Watts* v. *Hadden*, 651 F.2d 1354 (10th Cir. 1981); *Dancy* v. *Arnold*, 572 F.2d 107 (3d Cir. 1978); *Brown* v. *Carlson*, 431 F. Supp. 775 (W. D. Wisc. 1977). But see, *Outing* v. *Bell*, F.2d 1144 (4th Cir. 1980).

[297] See Crime Control Act Hearings (statement of the Department of Justice at 19–21).

Subsection (b) is added to make clear that a judgment of conviction is final even though it includes a provisional sentence that is subject to modification as described in subsection (c), subject to correction pursuant to proposed 18 U.S.C. 3742, or, if the sentence is outside the guidelines, subject to appeal and modification pursuant to proposed 18 U.S.C. 3742.

Subsection (c) provides that a court may not modify a sentence except as described in the subsection. The subsection provides "safety valves" for modification of sentences in three situations.

The first "safety valve" applies, regardless of the length of sentence, to the unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner. In such a case, under subsection (c)(1)(A), the Director of the Bureau of Prisons could petition the court for a reduction in the sentence, and the court could grant a reduction if it found that the reduction was justified by "extraordinary and compelling reasons" and was consistent with applicable policy statements issued by the Sentencing Commission.[298] (Subsection (c)(1)(B) simply notes the authority to modify a sentence if modification is permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure.)

Another "safety valve," set forth in subsection (c)(2), permits the court to reduce a term of imprisonment, upon motion of the defendant or the Director of the Bureau of Prisons or on its own motion, if the term was based on a sentencing range in the applicable guideline that was lowered by the Sentencing Commission after the defendant's sentence was imposed and if such a reduction is consistent with applicable policy statements of the Sentencing Commission.

The value of the forms of "safety valves" contained in this subsection lies in the fact that they assure the availability of specific review and reduction of a term of imprisonment for "extraordinary and compelling reasons" and to respond to changes in the guidelines. The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations.

Subsection (d) permits the court to order, in conjunction with a term of imprisonment, that a defendant convicted of a felony violation of the laws relating to organized crime or drug offenses, not associate or communicate with a specified person if there is probable cause to believe that association or communication with the person is for the purpose of continuing the defendant's participation in an illegal enterprise. The order may be issued at the time of sentencing or may be issued at a later date if the Bureau of Prisons or the United States attorney requests. The order may not extend to association or communication with the defendant's counsel. The purpose of the provision is to prevent the defendant from continuing his illegal activities from his place of confinement. The provision is similar in concept to the provision of section 3563(b) (7) that permits the court to order as a condition of probation or supervised release that a defendant not associate unnecessarily with a specified person. The provision is not intended to limit in any way the current authority of the Bureau of Prisons to take appropriate measures to control similar or related activities on the part of prisoners or otherwise to impose reasonable restrictions on association or communication by prisoners. This aspect of a sentence is not referred to in the provision relating to appellate review of sentence since the concerns with limitations on communications are constitutional concerns to be decided under existing law on constitutional grounds by the courts on a case-by-case basis.

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[298] This is similar to the authority of the Bureau of Prisons in 18 U.S.C. 4205(g) to file a motion with the court at any time to reduce the minimum term of a prisoner so that he can be paroled.

Two other points should be noted in conjunction with section 3582. First, in articulating for the first time a general philosophy of sentencing—embodying the concepts of deterrence, incapacitation, just punishment, and rehabilitation—the bill avoids the highly emotional past debate over whether or not there should be a general sentencing presumption either in favor of incarceration or in favor of probation. The approach taken in the bill is to avoid any general reference to either presumption and, instead, rely on the general purposes of sentencing, leaving to the specific guidelines promulgated by the Commission the issue of whether imprisonment in an individual case is appropriate or not. Second, it is, of course, apparent that the general purposes of sentencing, in and of themselves, will not solve the problem of disparity. Obviously, this section must be read in conjunction with the specific guidelines, and other provisions of the bill, which are designed to deal with the immediate practical problem of disparity.

SECTION 3583. INCLUSION OF A SENTENCE OF SUSPERVISED RELEASE AFTER IMPRISONMENT

1. In general

Proposed 18 U.S.C. 3583 is a new section that permits the court, in imposing a term of imprisonment for a felony or a misdemeanor, to impose as part of the sentence a requirement that the defendant be placed on a term of supervised release to be served after imprisonment.

2. Present Federal law

Under current law, both the length of time that a defendant may be supervised on parole following a term of imprisonment and the length of time for which a parolee may be reimprisoned following parole revocation are dependent on the length of the original term of imprisonment.

Under 18 U.S.C. 4210(a), a parolee remains in the legal custody and under the control of the Attorney General until the expiration of the maximum term or terms of imprisonment to which he was sentenced. Thus, the smaller percentage of his term of imprisonment a prisoner spends in prison, the longer his period of parole supervision. The jurisdiction of the Parole Commission may be terminated by operation of law at an earlier date under 18 U.S.C. 4210(b) if the defendant was released as if on parole at the end of his term of imprisonment less credit toward good time[299] and there are less than 180 days of the term of imprisonment remaining. Supervision may be discontinued before the termination of jurisdiction if, upon its own motion or motion of the parolee, the Parole Commission determines to terminate it before the statutory time.[300] The Parole Commission is required to review periodically the need for continued supervision,[301] and may not continue supervision for more than five years after the parolee's release on parole unless it makes a finding after a hearing "that such supervision should not be terminated because there is likelihood that the parolee will engage in conduct violating any criminal law."[302]

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[299] See 18 U.S.C. 4164.

Under current law, the question whether a defendant sentenced to a term of imprisonment in excess of one year will be supervised on parole following release is dependent on whether or not the defendant is released on good time or on parole with more than 180 days remaining of his prison term.[303] It is not dependent on whether the defendant needs supervision following release; a defendant who needs supervision may have had such a poor disciplinary record in prison that he has less than 180 days of good time; a defendant who needs no supervision may have served only one-third of an unusually long sentence.

Under present law, if a parolee violates a condition of parole that results in a determination to revoke parole, the revocation has the effect of requiring the parolee to serve the remainder of his original term of imprisonment, subject to periodic consideration for rerelease as required for any prisoner who is eligible for parole.[304]

Current law also contains two provisions that result in street supervision following confinement of a person sentenced to a period of confinement of less than a year. Under 18 U.S.C. 3651, a defendant who is convicted of an offense for which the maximum term of imprisonment is more than six months may be sentenced to a split sentence with no more than six months' imprisonment followed by probation. Under 18 U.S.C.4205(f), the sentencing judge may specify that a defendant sentenced to between six months and one year in prison will be released as if on parole (i.e., subject to street supervision) after serving one-third of the term.

3. Provisions of the bill, as reported

This section permits the court, in imposing a term of imprisonment for a felony or a misdemeanor, to include as part of the sentence a requirement that the defendant serve a term of supervised release after he has served the term of imprisonment. Unlike current parole law, the question whether the defendant will be supervised following his term of imprisonment is dependent on whether the judge concludes that he needs supervision, rather than on the question whether a particular amount of his term of imprisonment remains. The term of supervised release would be a separate part of the defendant's sentence, rather than being the end of the term of imprisonment. If the term of supervised release is longer than recommended in the applicable sentencing guidelines, the defendant may appeal it under proposed section 3742; if it is shorter, the government may appeal on behalf of the public.

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[300] 18 U.S.C. 4211(a). Parole Commission standards for determining whether to terminate supervision early are set forth in 28 C.F.R. § 2.43(e).

[301] 18 U.S.C. 4211(b).

[302] 18 U.S.C. 4211(c)(1).

[303] 18 U.S.C. 4164 and 4210(b).

[304] See 28 C.F.R. § 2.21 (1983).

Subsection (b) specifies the authorized maximum terms of supervised release, with the terms ranging from a maximum of one year for a defendant sentenced for a Class E felony or for a misdemeanor, to a term of not more than three years for a defendant released after serving a term of imprisonment for a Class A or B felony. The length of the term of supervised release will be dependent on the needs of the defendant for supervision rather than, as in current law, on the almost sheer accident of the amount of time that happens to remain of the term of imprisonment when the defendant is released.

Subsection (c) specifies the factors that the judge is required to consider in determining whether to include a term of supervised release as a part of the defendant's sentence, and, if a term of supervised release is included, the length of the term. The judge is required to consider the history and characteristics of the defendant, the nature and circumstances of the offense, the need for the sentence to protect the public from further crimes of the defendant and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner, the applicable sentencing guidelines and policy statements, and the need to avoid unwarranted sentencing disparity. The Committee has concluded that the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release—that the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.

Subsection (d) describes the conditions that the judge may impose on a person who is placed on supervised release. The court is required to order, as a condition of supervised release, that the defendant not commit another crime during the period of supervision. It may also order any of the conditions set forth as conditions of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(19), and any other condition it considers appropriate, if the condition is reasonably related to the history and characteristics of the offender and the nature and circumstances of the offense, the need for the sentence to protect the public from further crimes of the defendant, and the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. Whatever conditions are imposed may not involve a greater deprivation of liberty than is necessary to protect the public and to provide needed rehabilitation or corrections programs, and must be consistent with any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).

Subsection (e) permits the court, after considering the same factors considered in the original imposition of a term of supervised release, to terminate a term of supervised release previously ordered at any time after one year of supervised release; or, after a hearing, to extend the term of supervised release (if less than the maximum term was originally imposed); or modify, reduce, or enlarge the conditions of supervised release; or to treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of title 18. The court is also empowered by subsection (e)(3) to treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of this title and to carry out the appropriate contempt proceedings and sanctions as specified in 18 U.S.C. 401. It is intended that contempt of court proceedings will only be used after repeated or serious violations of the conditions of supervised release.

In past Congresses, the legislative history of the sentencing reform proposal has contemplated use of criminal contempt as a sanction for violation of conditions of post-release supervision. The Probation Committee of the Judicial Conference urged the Committee to expressly state the availability of this sanction in the legislation to avoid confusion, and the Committee has done so.

Subsection (f) requires the court to direct the probation officer to provide the defendant with a clear and specific statement of the conditions of supervised release.

In effect, the term of supervised release provided by the bill, takes the place of parole supervision under current law. Unlike current law, however, probation officers will only be supervising those releasees from prison who actually need supervision, and every releasee who does need supervision will receive it.[305] The term of supervised release is very similar to a term of probation, except that it follows a term of imprisonment and may not be imposed for purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the term of imprisonment. Unlike a term of probation, however, the term of supervised release is not subject to revocation for a violation. Instead, for the usual violations, the term or conditons of supervised release may be amended pursuant to subsection (e). If the violation is a new offense, the defendant may, of course, be prosecuted for the offense or held in contempt of court for violations of the court order setting the conditions of supervised release. The Committee did not provide for revocation proceedings for violation of a condition of supervised release because it does not believe that a minor violation of a condition of supervised release should result in resentencing of the defendant and because it believes that a more serious violation should be dealt with as a new offense. In the case of a serious violation, of course, the fact that a defendant is charged with a new offense committed while he was on release will be pertinent to the questions whether there is a risk of flight or danger to the community pending trial and what conditions might be imposed on his release.

SECTION 3584. MULTIPLE SENTENCES OF IMPRISONMENT

1. In general

This section provides the rules for determining the length of a term of imprisonment for a person convicted of more than one offense. It specifies the factors to be considered in determining whether to impose concurrent or consecutive sentences. It further provides that consecutive sentences, and any portions thereof during which the defendant is subject to early release, shall be treated as a single sentence for administrative purposes.

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[305] The functions of probation officers with respect to supervised release are described more fully in the discussion of proposed 18 U.S.C. 3603.

2. Present Federal law

There are no provisions of current law covering the contents of this section.[306] Existing law permits the imposition of either concurrent or consecutive sentences, but provides the courts with no statutory guidance in making the choice.[307] Terms of imprisonment imposed at the same time are deemed to run concurrently rather than consecutively if the sentencing court has not specified otherwise.[308] Exceedingly long consecutive terms commonly are avoided through the exercise of judicial restraint. A term of imprisonment imposed on a person already serving a prison term is deemed to be concurrent with the first sentence if the first sentence is for a Federal offense,[309] but is usually served after the first sentence if that sentence involves imprisonment for a State or local offense.[310]

3. Provisions of the bill, as reported

Proposed 18 U.S.C. 3584(a) provides that sentences to multiple terms of imprisonment may, with one exception, be imposed to be served either concurrently or consecutively, whether they are imposed at the same time or one term of imprisonment is imposed while the defendant is serving another one. The exception is that consecutive terms of imprisonment may not, contrary to current law, be imposed for an offense described in section 1001 (Criminal Attempt) and for an offense that was the sole objective of the attempt. This limitation on consecutive sentences follows the recommendation of the National Commission.[311] Of course, if the attempt involved plans for a complex pattern of criminal activity and the defendant was convicted of attempting, conspiring, or soliciting such a pattern of activity, the fact that he was also convicted of completing one or more, but not all, the planned offenses would not preclude, under the provisions of section 3584(a), the imposition of consecutive terms of imprisonment.

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[306] 18 U.S.C. 4161, however, does deal with aggregating sentences for purposes of good time allowances, and 18 U.S.C. 4205(a) provides in effect for aggregation of sentences for purposes of determining the date of parole eligibility.

[307] See, e.g., *Pereira* v. *United States*, 347 U.S. 1 (1954), sustaining the imposition of consecutive sentences for conspiracy to commit mail fraud and that substantive offense.

[308] See *Borum* v. *United States*, 409 F.2d 433 (D.C. Cir. 1967), cert, denied, 395 U.S. 916 (1969).

[309] See *Subas* v. *Hudspeth*, 122 F.2d 85 (10th Cir. 1941). "Absent clear language to the contrary, it is presumed that sentences imposed on more than one offense at the same time, or at different times, will run concurrently." *Id.* at 87, citing *United States* v. *Daugherty*, 269 U.S. 360 and other cases.

[310] See *Larios* v. *Madigan*, 299 F.2d 98, 100 (9th Cir. 1962); *United States* v. *Harrison*, 156 F. Supp. 756 (D.N.J. 1957), which states the opinion that the rule set forth in note 309 does not apply where one sentence is imposed by a State court and one by a Federal one. *Id.* at 760. Some courts have held that the Federal courts do not have the authority to make a Federal sentence concurrent with a State sentence already being served since 18 U.S.C. 3568 specifies that the Federal term commences when the defendant is received by Federal authorities. See, e.g., *United States* v. *Segal*, 549 F.2d 1293. 1301 (9th Cir. 1977).

[311] See National Commission Final Report, *supra* note 1, § 3204(2)(b). Proposed 18 U.S.C. 2304(a) in S. 1722, 96th Congress, also contained a bar to imposition of consecutive sentences for a criminal conspiracy or solicitation of a crime and another offense that was the sole objective of the conspiracy or solicitation. This provision has been replaced by a directive to the Sentencing Commission in proposed 28 U.S.C. 994(*l*) that the guidelines reflect the "general inappropriateness" of such consecutive sentences.

The National Commission also specified that terms should not be consecutive in two other situations: that in which one offense is a lesser included offense of the other; and that in which one offense prohibits the same conduct as the other, where one statute describes the conduct generally and another statute describes the conduct specifically.[312] The Committee has not included the first of these provisions since it generally does not favor conviction for an offense and a lesser included offense. The second situation is covered in new 28 U.S.C. 994(u) in the form of guidance to the Sentencing Commission in promulgating policy statements for sentencing.

Proposed 18 U.S.C. 3584(a) also codifies the rule that, if the court is silent as to whether sentences to terms of imprisonment imposed at the same time are concurrent or consecutive, the terms run concurrently unless a statute requires that they be consecutive.[313] If, on the other hand, multiple terms of imprisonment are imposed at different times without the judge specifying whether they are to run concurrently or consecutively, they will run consecutively unless the statute specifies otherwise. This carries forward current law where both sentences are for Federal offenses, but changes the law that now applies to a person sentenced for a Federal offense who is already serving a term of imprisonment for a State offense.[314]

Subsection (a) is intended to be used as a rule of construction in the cases in which the court is silent as to whether sentences are consecutive or concurrent, in order to avoid litigation on the subject. However, the Committee hopes that the courts will attempt to avoid the need for such a rule by specifying whether a sentence is to be served concurrently or consecutively. Ordinarily, under the guidelines system, if the court is sentencing for multiple offenses at the same time, the guidelines will specify an incremental penalty by which some portion of the sentence for the first offense is added to the sentence for each similar offense.[315] Thus, for example, if the term of imprisonment recommended in the guidelines for one offense is two years, the guidelines might recommend a sentence of two and a half or three years if the defendant was convicted of three or four such offenses. On the other hand, if the defendant was being sentenced at one time for two entirely different offenses committed at different times, the judge might think that adding the guidelines sentences for the offenses together was appropriate, and specify fully consecutive sentences rather than overlapping ones. Similarly, if the defendant was convicted of one offense that was committed in the course of another offense (for example, murder committed in the course of a civil rights violation), the judge might wish to assure that there was at least some additional sentence over what the sentence would have been for only one of the offenses—or the sentencing guidelines or policy statements might recommend adding the two sentences together in order to assure an appropriate sentence for all the criminal conduct of the defendant.

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[312] See National Commission Final Report, *supra* note 1, § 3204(2)(a) and (c).

[313] See, e.g., 18 U.S.C. 924(c).

[314] Thus, it is intended that this provision be construed contrary to the holding in *United States* v. *Segal, supra* note 310.

[315] Proposed 28 U.S.C. 994(*l*)(1).

Subsection (b) provides that in evaluating whether the sentences should run concurrently or consecutively, the court must consider the nature and circumstances of the offenses and the history and characteristics of the offender, the need for just punishment, deterrence, incapacitation, and rehabilitation, and the sentencing guidelines and any pertinent policy statements of the Sentencing Commission. It is anticipated that in certain situations a purpose of incapacitation alone might warrant imposition of consecutive terms of imprisonment, while in other situations other purposes of sentencing might mandate the imposition of concurrent terms. Correspondingly, although similar offenses committed in the course of a single criminal episode would ordinarily be appropriate subjects for concurrent sentences, there may be instances in which the just punishment purpose of sentencing might require the imposition of distinct, separately identifiable sentences for each of the particular offenses the defendant is found to have committed. More frequently, perhaps, multiple offenses will result in a base sentence for the first offense or for the most serious offense being added to an incremental sentence for each subsequent offense. The subsection simply serves to call attention to the fact that in this sentencing determination, as in any other sentencing determination, the principal focus should be upon the purposes to be served by the sentence, and that the sentence should be structured accordingly.[316]

Subsection (c) provides that consecutive terms of imprisonment shall be treated as an aggregate for administrative purposes, thus simplying administration.

SECTION 3585. CALCULATION OF A TERM OF IMPRISONMENT

1. In general

This section provides the method of calculating the onset of a term of imprisonment and contains provisions for crediting an offender for prior custody.

2. Present Federal law

Current Federal law on these subjects is contained in 18 U.S.C. 3568. That section provides that a term of imprisonment commences on the date that the offender is received at an institution for the service of his sentence or on the date he is taken into custody awaiting transportation to the place he is to serve his sentence. It further provides that the offender will receive credit for any time spent in custody in connection with the offense or acts for which the sentence was imposed.

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[316] The problem of determining whether to impose concurrent or consecutive terms of imprisonment is made even more acute by the fact that criminal conduct on the part of an individual often may be dissected into a number of Federal offenses as different jurisdictional bases provide authority for filing several charges for essentially the same course of conduct. For example, the mailing of fifty letters to effect a scheme to defraud technically constitutes the commission of fifty offenses for which separate charges could be brought and separate consecutive sentences imposed. This is an example of a problem in sentencing under Federal law that should be addressed by the Sentencing Commission's guidelines and policy statements.

3. Provisions of the bill, as reported

Subsection (a) of proposed 18 U.S.C. 3585 provides that the sentence commences on the date that the defendant is received in custody awaiting transportation to the facility in which he is to serve his sentence, or arrives voluntarily at such facility.[317] Current law language differs from subsection (a) by stating that a sentence begins from the date of receipt at a facility or, if he is committed to one facility to await transportation to another facility, on the date of receipt at the first facility. The Committee does not intend a different result by not specifically requiring that the defendant be committed to the facility from which he will be transported.

The Committee also does not intend that this provision be read to bar concurrent Federal and State sentences for a defendant who is serving a State sentence at the time he receives a Federal sentence.[318] It should be possible for the Bureau of Prisons to use its authority to contract with State facilities to make equitable arrangements for a defendant to continue to reside in the State facility while serving part of his Federal sentence.

Subsection (b) provides that the defendant will receive credit towards the sentence of imprisonment for any time he has spent in official custody prior to the date the sentence was imposed where the custody was a result of the same offense for which the sentence was imposed or was a result of a separate charge for which he was arrested after the commission of the current offense. No credit would be given if such time had already been credited toward the service of another sentence.

SECTION 3586. IMPLEMENTATION OF A SENTENCE OF IMPRISONMENT

This section calls attention to the imprisonment provisions in subchapter C of chapter 229, and to provisions in subchapter A of chapter 229 relating to terms of supervised release, to facilitate appropriate reference to the portions of the bill that control the general administration of imprisonment and release matters.

CHAPTER 229.—POST-SENTENCE ADMINISTRATION

Proposed chapter 229 of title 18, United States Code, consists of three subchapters which cover the administration of the various types of sentences imposed under proposed chapter 227. Subchapter A provides for the appointment of probation officers and sets forth their duties. In addition, it provides for special probation and record expungement procedures for drug possession offenses. Subchapter B covers the payment and collection of fines which may be imposed under subchapter C of chapter 227. Subchapter C of chapter 229, sets forth the procedures for sentences to prison terms.

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[317] This provision is based upon a recommendation of the Judicial Conference of the United States. See Criminal Code Hearings, Part XVI, at 11929.

[318] See notes 310 and 314, *supra*.

SUBCHAPTER A.—PROBATION

(Sections 3601-3607)

This subchapter contains the provisions for implementation of a sentence to probation pursuant to proposed subchapter B of chapter 227, the placement of juvenile delinquents on probation pursuant to existing chapter 403, and the placement of an individual on supervised release pursuant to proposed 18 U.S.C. 3583. The subchapter, for the most part, carries forward current law concerning the appointment of probation officers by the courts and the powers and duties of probation officers.

SECTION 3601. SUPERVISION OF PROBATION

Proposed 18 U.S.C. 3601 requires that a person sentenced to a term of probation under proposed subchapter B of chapter 227, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court.

Current law does not treat probation as a sentence, but rather treats it as a suspension of the execution or imposition of sentence.[319] While it contains no general requirement of probation supervision, by requiring that probation officers report to the courts on the conduct of probationers,[320] it does assume that probationers will be supervised.

While current law permits a juvenile delinquent to be placed on probation,[321] it does not specifically provide that probation officers and the courts have the same duties as to juvenile probationers as they have as to adult probationers.

Under this section, probation officers will also supervise those prisoners who are conditionally released from prison under 18 U.S.C. 3655. While current law refers to these releasees as parolees, rather than as persons released on supervised release, the role of the probation officer in supervising the releasee will remain the same as under current law.

SECTION 3602. APPOINTMENT OF PROBATION OFFICERS

Proposed 18 U.S.C. 3602 is largely derived from 18 U.S.C. 3654. Subsection (a) requires each district court of the United States to appoint suitable and qualified persons to serve with or without compensation as probation officers under the direction of the court. Those appointed with compensation are removable by the court for cause, rather than removable at the discretion of the court. This is a change from existing laws, which was made upon the recommendation of the Probation Committee of the Judicial Conference. Volunteers serving without compensation remain subject to removal at the discretion of the court. The requirement that probation officers be appointed is also new. Under existing law, the court is authorized, rather than required, to appoint probation officers since the original reason for enacting probation legislation was to grant the courts the power to suspend sentences and appoint probation officers, a procedure which the courts had sought to exercise without specific authority.[322]

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[319] 18 U.S.C. 3651. In the case of juvenile delinquents, probation seems to be an alternative to suspension of an adjudication of delinquency or disposition of the delinquent, and to commitment to the Attorney General, rather than the suspension of imposition or execution of sentence. See 18 U.S.C. 5037(b).

[320] 18 U.S.C. 3653 and 3655. In addition, the form used by sentencing judges to list conditions of probation assumes supervision.

[321] 18 U.S.C. 5037(b).

Existing law provides that probation officers be "suitable" but does not include the requirement that they be "qualified" by training or background to be probation officers. Given the bill's encouragement of the use of innovative conditions of probation to meet the purposes of sentencing, different sorts of qualified probation officers should be available to the courts. The effective supervision of a convicted loan-shark, union, forger, or brokerage house, for example, would require quite different qualifications. some of these qualifications might be found among probation officer "specialists" (who might be made available, as the need arose, to any of several courts); others might be needed so rarely as to warrant only occasional special appointments from the requisite profession to supervise the few cases in which such talents would be helpful.

Existing law also provides that probation officers serve without compensation except when it appears that the "needs of the service" require compensation. This provision has been dropped as outmoded in recognition of the importance of a qualified professional probation system. Of course, the courts may continue to use the services of qualified volunteers.

Proposed 18 U.S.C. 3602(b) carries forward the existing provision concerning the order of appointment of a probation officer.

Subsection (c) carries forward the existing provision permitting designation of a chief probation officer by the court to direct the work of all probation officers serving within the judicial district. The provision has been amended from current law to make clear that each judicial district has only one chief probation officer even if the district has more than one division or place of holding court.

SECTION 3603. DUTIES OF PROBATION OFFICERS

Proposed 18 U.S.C. 3603 carries forward the provisions of 18 U.S.C. 3655 relating to the duties of probation officers with respect to supervision of probationers and the keeping of records and making of reports, but modifies the provisions to include persons released on supervised release following a term of imprisonment pursuant to section 3583. The section also adds a number of specific requirements not found in current law, including the requirements that the probation officer be responsible for supervision of any probationer or person on supervised release known to be within the judicial district (in order to clarify supervised authority over probationers and persons on supervised release transferred into his district or temporarily present in the district), and that, when requested, he supervise and furnish information about persons on work release, furlough, or other authorized release or in pre-release custody pursuant to section 3624(c). The current law provisions requiring probation officers to keep records of money received from probationers have been dropped as unnecessary since it is not the responsibility of the probation officer to perform such functions as collecting fines imposed by the courts.

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[322] See H. Rept. No. 1377, 68th Cong., 2nd Sess. 1 (1925).

SECTION 3604. TRANSPORTATON OF A PROBATIONER

This section carries forward the provisions of 18 U.S.C. 4283 permitting a court to order a United States marshal to furnish transportation to a person placed on probation to the place where he is required to go as a condition of probation. Under existing law, the court also may order subsistence expenses for the probationer while traveling to his destination, not to exceed thirty dollars. Section 3604 does not specify a limitation on the amount of subsistence which could be paid, but would permit the Attorney General to prescribe reasonable subsistence payments.

SECTION 3605. TRANSFER OF JURISDICTION OVER A PROBATIONER

Proposed 18 U.S.C. 3605, relating to transfer of jurisdiction over a probationer or person on supervised release from one court to another, is derived from 18 U.S.C. 3653. Both current law and section 3605 require the concurrence of the court receiving jurisdiction of a probationer in the transfer of jurisdiction. Section 3605 expands current law to cover persons on supervised release and provides that the transfer of a probationer or person on supervised release to another district may be made either as a condition of probation or supervised release or with the permission of the court, while 18 U.S.C. 3653 provides for transfer of a probationer "from the district in which he is being supervised." The ability of the sentencing judge to provide that the defendant move or go to another district as a condition of probation or supervised release [323] could prove to be a very useful aspect of an effective sentence to a term of probation. It could be used in conjunction with a condition to work at particular employment or pursue a particular course of study.[324] Perhaps most important, it could provide the judge with an alternative to a term of imprisonment in the situation where that would otherwise be the only alternative to returning the defendant to an environment in which there would be an unacceptable risk that he might commit another offense.

Section 3605 would also permit a court to which jurisdiction over a probationer or person on supervised release was transferred to exercise all the powers over the probationer or releases that are permitted by this subchapter or proposed subchapter B of chapter 227. Under 18 U.S.C. 3653, the court to which jurisdiction was transferred could not change the period of probation without consent of the sentencing court. The Committee believes that it is unnecessary to retain the sentencing court's restriction since the new court will be in a better position to know whether a change in the term of probation is justified. In addition, the change should result in simplifying sentencing on new charges, by permitting the transfer of jurisdiction over the probationer or release to the district in which the new charges have been filed so that the sentencing judge may adjust the term of probation or supervised release as needed to serve the purpose of sentencing on the new charge.

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[323] See proposed 18 U.S.C. 3563(b)(14) and 3583(d).

[324] Proposed 18 U.S.C. 3563(b)(5) and 3583(d).

SECTION 3606. ARREST AND RETURN OF A PROBATIONER

Proposed 18 U.S.C. 3606 continues the provisions of 18 U.S.C. 3653 which authorize the arrest and return of a probationer to the court having jurisdiction over him when there has been a violation of a condition of probation, and expands the provision to refer to persons on supervised release pursuant to section 3583. The Committee intends that any probationer arrested for violation of a condition of probation be returned to the district in which he is being supervised even if the arrest is in a different district.

A probation officer may make the arrest, with or without a warrant, wherever the probationer or releasee is found. An arrest warrant for violation of release conditions may be issued by the court having supervision over the individual, or if none, by the court which last had supervision over him. Either a probation officer or a United States Marshal may execute this warrant wherever the probationer or releasee is found. The provisions of 18 U.S.C. 3653 concerning revocation of probation and reimposition of sentence for probation violations are covered in Rule 32.1 of the Federal Rules of Criminal Procedure and in section 3565. As discussed in connection with section 3583, the bill contains no specific provisions concerning revocation of a term of post-release supervision, but instead relies on other remedies, including modification of conditions and the use of the court's contempt powers, to enforce the conditions.

SECTION 2607. SPECIAL PROBATION AND EXPUNGEMENT PROCEDURES FOR DRUG POSSESSORS

Proposed 18 U.S.C. 3607 carries forward the provisions of 21 U.S.C. 844(b) relating to special probation without entry of judgment for first offenders found guilty of violating section 404 of the Controlled Substances Act (21 U.S.C. 844) if there has been no previous conviction of an offense under a Federal or State law relating to controlled substances. The section also permits expungement of records for persons placed on probation under the section if they were under the age of twenty-one at the time of the offense and did not violate a condition of probation.

SUBCHAPTER B.—FINES

(Sections 3611–3613)

This subchapter is designed to increase the efficiency with which the government collects fines assessed against criminal defendants.[325] Present law, 18 U.S.C. 3565, provides that criminal fine judgments "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases." Thus, the Federal Government is greatly confined by State law and must litigate in order to collect a fine from an uncooperative defendant. These relatively cumbersome procedures have resulted in collection by the United States in recent years of only 60 to 70 percent of the amount of fines imposed. The consequent awareness by criminal defendants that they may be able to avoid paying fines with relative impunity bodes ill for respect for the law.

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[325] For a comprehensive discussion on collecting and paying fines and penalties, see testimony of William T. Plumb, Jr., Subcommittee Criminal Code Hearings, Part III, at 1709–1732.

This subchapter attempts to remedy this situation by treating criminal fine judgments like tax liens for collection purposes, thereby making available to the Attorney General summary collection procedures similar to those used by the Internal Revenue Service. Foremost among these is the power to administratively levy against the property of the defendant, which precludes disposition of the property to avoid payment and permits realization of the amount of the fine without litigation.

SECTION 3611. PAYMENT OF A FINE

Proposed 18 U.S.C. 3611 provides for the payment of a fine imposed under proposed subchapter C of chapter 227 to the clerk of the sentencing court to be forwarded to the United States Treasury.

The section requires either immediate payment or payment by the time and method specified by the sentencing court. This latter provision is in recognition of the authorization granted the court by proposed 18 U.S.C. 3572(d) to permit payment of a fine within a specified period of time or in specified installments.

SECTION 3612. COLLECTION OF AN UNPAID FINE

Proposed 18 U.S.C. 3612 requires the sentencing court, whenever a fine is imposed, to provide the Attorney General with certain certified information. The Attorney General is then made responsible for the collection of the fine should it not be paid at the time required. This retains the basic current law provision that vests the duty of collecting fines in the Attorney General.

In the case of all fines imposed, subsection (a) requires the district court that imposes sentence to certify to the Attorney General specified information about the defendant and the fine, most of which is identification information and information relating to the case in which the fine is imposed and to the fine itself. The court is also required to certify any subsequent remission or modification of the fine, and to notify the Attorney General of any payments that the court receives with respect to previously certified fines.

This provision, placing responsibility on the clerk of the district court, should improve the notification process and thus better insure that all fine-debtors are brought to the attention of the enforcing authorities in the Department of Justice. At the present time, there is no standardized procedure for notification of the United States attorney. Rather, he receives notification of fines and payment difficulties through a number of methods, which increases the chance of administrative oversight of a failure to pay. By centralizing the responsibility for notification in the district court, section 3612 lessens this chance.

Subsection (b) places the responsibility for collecting and enforcing criminal fines with the Attorney General. Since this responsibility is currently centered in the Criminal Division of the Department of Justice and the United States attorneys, this provision effects no change in existing law. Rather than shifting the burden of enforcement (e.g., to the Internal Revenue Service), the Committee has elected to expand the enforcement powers of the Justice Department in order to strengthen the government's collection effort.

SECTION 3613. LIEN PROVISIONS FOR SATISFACTION OF AN UNPAID FINE

1. In general

Proposed 18 U.S.C. 3613 establishes the procedure by which the Attorney General is to make collection of unpaid fines. This section significantly improves current practices by providing a Federal collection procedure independent of State laws and patterned on the collection procedures utilized so successfully over the years by the Internal Revenue Service.

2. Present Federal law

The primary method of enforcement currently used by the Federal Government is execution of a judgment, either against income (garnishment) or against real or personal property. Writs of execution are issued by the district court and endorsed by the United States marshal. In the case of income executions, the procedures are dictated by the law of the State in which the Federal court sits. Where execution is to be made against property, the procedure to be followed is that detailed in 28 U.S.C. 2001-2007; State law may also be used. In either case, however, State law prescribes how much income may be garnished and the classes of property (e.g., homestead) that are exempt from Federal execution.

Criminal fine judgments are liens on property in the State to the same extent as a judgment of a court of general jurisdiction in the State is a lien. They may also be perfected as liens under State law, if the law of the State in which the district court sits permits perfection of a lien based on a Federal judgment in the same manner as provided for judgments in the State courts.[326] Because of State exemption laws, other perfected liens, and unclear title to the property, enforcement of a Federal lien (which under most State laws is confined to real estate) by foreclosure and sale is usually not a realistic possibility. The Committee regards the lien as a protective first step, since it does help insure the satisfaction of the debt should the defendant-debtor wish to transfer the property.

The laws of several States allow a judgment creditor (in the case of a criminal fine, the United States Government) to obtain an order compelling the judgment debtor (the defendant) to make specified installment payments where it is shown that he is receiving or will receive money from any source. This order is called an installment payment order and results from a Federal district court hearing sought by the United States. Notice must be given to the judgment debtor so that he may appear and contest the motion.

Finally, Rule 69(a) of the Federal Rules of Civil Procedure states in part that:

> In aid of the judgment or execution, the judgment creditor * * * may obtain discovery from any person, in-

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[326] 28 U.S.C. 1962.

> cluding the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

The United States Attorney may use this rule to obtain financial information about the debtor-defendant by oral or written depositions or by written interrogatories. In most cases, the assistance of the district court or a United States magistrate is necessary.

3. Provisions of the bill, as reported

Section 3613(a) eliminates the clerical procedures necessary to create judgment liens, by providing that the fine:

> * * * is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b).

Language added in the 97th Congress requires the Attorney General to release the lien upon acceptance of a bond described in section 6325 of the Internal Revenue Code of 1954, or to issue a certificate of discharge of any part of the person's property subject to a lien if the Attorney General determines that the property remaining is equal in value to at least three times the amount of the fine. These provisions were added in response to business concerns that the original lien provisions could have resulted in tying up property far in excess of that needed to satisfy the lien, making it difficult to carry on normal business transactions pending payment of the fine.

Under subsection (a), a lien similar to a tax lien arises at the time of judgment, and, as subsection (c) provides, may be enforced like a tax lien through the use of administrative levy procedures. Filing under subsection (d) is necessary only to perfect the lien as against innocent third parties.

This procedure significantly alters current practices. As stated previously, 28 U.S.C. 1962 provides that:

> Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time. Whenever the law of any State requires a judgment of a State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed, or otherwise conformed to rules and requirements relating to judgments of the courts of the State.

These liens are usually only against real estate, and enforcement of the lien is often prevented by the State law restrictions noted above. Further, the life of the lien is prescribed by the law of the State in which the district court sits. State laws usually require an abstract of judgment to be filed in the office of the county clerk, county recorder, or other State or county office. A small recording fee is assessed. Most of these procedural limitations and requirements are eliminated by section 3613(a).

Subsection (b) changes current law by imposing a twenty-year statute of limitations on the collection of criminal fines. Under existing law, the government's right to seek execution of a criminal sentence, including a fine, is not subject to time limitations.[327] Currently, such cases may be closed only through payment in full, death of the debtor, or Presidential pardon. The limitation period established by subsection (b) will permit the closing of files by United States Attorneys for cases which are so old that collection of fines is unlikely. With the new enforcement tools of section 3613, it seems reasonable to conclude that if a debtor is pursued unsuccessfully for the twenty-year period, it is unlikely that additional enforcement efforts would prove fruitful. A number of unproductive clerical tasks will thus be eliminated by this provision.

The period for collection may be extended by a written agreement entered into by the defendant and the Attorney General prior to the expiration of the period. This allowance for an extension is similar to that existing in the tax area.[328]

Subsection (b) also provides that the running of the twenty-year statute of limitations is to be suspended "during any interval for which the running of the period of limitations for collection of a tax would be suspended" pursuant to the following provisions of law:

> (A) 26 U.S.C. 6503(b), relating to cases where the assets of the taxpayer are in the control of custody of a court in a proceeding before any United States, District of Columbia, or State court; the suspension of the limitations period is also extended for six months after the court proceeding ends;
>
> (B) 26 U.S.C. 6503(c), relating to cases where the taxpayer is outside the United States if the absence is for a continuous period of at least six months;
>
> (C) 26 U.S.C. 6503(f), relating to cases where the property of a third person has been wrongfully seized;
>
> (D) 26 U.S.C. 7508(a)(1)(I), relating to cases where the person is serving in the armed forces of the United States, or in support of such forces, during time of war, or is in a hospital as a result of a combat injury, and for 180 days thereafter; and
>
> (E) section 513 of the Act of October 17, 1940, 54 Stat. 1190, relating to cases where the person is serving in the military.

Finally, subsection (b) provides that a lien becomes unenforceable and liability to pay a fine expires upon the death of the individual fined. This is in keeping with present law, and reflects one of the differences between a criminal fine and a tax liability, despite their generally similar treatment in this statute. The word "individual" is used instead of "person" to exclude organizations such as corporations from this provision, and to avoid the argument that a fine against a corporation is extinguished on the dissolution (and therefore "death") of the corporation. In such case, an existing fine will make the United States a creditor against the assets of the dissolved corporation with whatever preferences the provisions of this section grant.

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[327] *Smith* v. *United States*, 143 F.2d 228 (9th Cir.), cert. denied, 323 U.S. 729 (1944).
[328] See 26 U.S.C. 6501(c)(4).

Subsection (c) provides that certain sections of the Internal Revenue Code of 1954, as amended, shall:

> * * * apply to a fine and to the lien imposed by subsection (a) as if the liability of the person fined were for an internal revenue tax assessment, except to the extent that the application of such statutes is modified by regulations issued by the Attorney General to accord with differences in the nature of the liabilities.

Among the provisions of title 26 incorporated by reference into section 3613, the most significant, of course, is the administrative levy power referred to previously. The following is a summary of the provisions of the tax code cross-referenced in section 3613 and made applicable to the collection of a fine:

(i) 26 U.S.C. 6323 (other than 6323(f)(4)), which contains notice and filing provisions, compliance with which is necessary to insure the validity of a tax lien against certain third persons; priority rules are also set forth;

(ii) 26 U.S.C. 6331, which authorizes the Secretary to collect a tax by levy on the property of a delinquent taxpayer if the lien has not been satisfied; as has been stated, incorporating this power into the scheme for collection of fines is the most significant change wrought by section 3613; it should be noted that 26 U.S.C. 6502, which establishes a six-year limitation period on the use of an administrative levy, has not been included in the section 3613 cross-references from title 26; thus, the twenty-year period set forth in section 3613(b) will also apply to the levy power in the area of criminal fine collection;

(iii) 26 U.S.C. 6332, which requires surrender of property subject to levy, and also provides for enforcement of the levy by civil penalty;

(iv) 26 U.S.C. 6333, which provides for demand by the Secretary of books and records relating to the property subject to levy;

(v) 26 U.S.C. 6334, which provides that certain property (including various unemployment benefits, retirement benefits, workman's compensation, and tools of a trade up to a value of $250) is exempt from levy; these exemptions are limited and standard; comparison should be made to the greater and more varied number of exceptions provided for in State laws to which the Federal government is now subject;

(vi) 26 U.S.C. 6335, which sets forth the procedure to be used in the sale of property seized pursuant to levy;

(vii) 26 U.S.C. 6336, which covers the sale of perishable goods;

(viii) 26 U.S.C. 6337, which provides for redemption of property before sale, and, with respect to real property, redemption after sale;

(ix) 26 U.S.C. 6338, which provides that a certificate of sale is to be given to the purchaser of the property sold, and that a deed shall also be given where the property sold is real estate;

(x) 26 U.S.C. 6339, which provides that the certificate of sale and the deed are to have certain legal effects, including their use as conclusive evidence as to the regularity of the proceedings, the transfer of the right, title, and interest of the party delinquent, etc.;

(xi) 26 U.S.C. 6340, which requires records to be kept of all sales;

(xii) 26 U.S.C. 6341, which requires the Secretary to determine which expenses are to be allowed in all cases of levy and sale;

(xiii) 26 U.S.C. 6342, which sets forth the order in which the proceeds of the levy and sale are to be applied to the taxpayer's liability;

(xiv) 26 U.S.C. 6343, which authorizes the Secretary to release the levy and to return the property, or proceeds, where the property has been wrongfully levied;

(xv) 26 U.S.C. 6901, which relates to the liability of a transferee in certain instances for a tax of the transferor in order to prevent a successful transfer to avoid liability;

(xvi) 26 U.S.C. 7402, which grants jurisdiction to the Federal courts in tax collection matters;

(xvii) 26 U.S.C. 7403, which allows the filing of an action to enforce a lien, or to subject property to the payment of a tax, whether or not a levy has been made; the court may appoint a receiver to enforce the lien;

(xviii) 26 U.S.C. 7405, which allows a civil suit to be brought to recover erroneous refunds;

(xix) 26 U.S.C. 7423, which authorizes the Secretary to allow repayment to an officer or employee of the United States of the full amount of sums that may be recovered against him in any court, for any taxes collected by him or any damages recovered against him in connection with anything done by him in the performance of his official duty;

(xx) 26 U.S.C. 7424, which permits intervention by the United States in any civil action to assert any lien on property which is the subject of the suit;

(xxi) 26 U.S.C. 7425, which provides for the discharge of a lien where the United States is not a party to the suit, unless notice of the lien was filed in the place provided for by law, according to the law of the place where the property was situated; where a judicial sale discharges a lien, the United States may claim the proceeds (before their distribution is ordered) with the same priority that the lien had; the United States may also redeem real property sold to satisfy a lien, under certain conditions;

(xxii) 26 U.S.C. 7426, which provides for suits against the United States by persons claiming an interest in the property levied, where the levy is claimed to be wrongful, or where the person claims an interest in surplus proceeds; an exception is provided for the person against whom the tax was assessed, out of which the levy arose;

(xxiii) 26 U.S.C. 7505(a), which provides that any personal property acquired by the United States in payment of, or as security for, debts arising out of the internal revenue laws may be sold by the Secretary in accordance with prescribed regulations;

(xxiv) 26 U.S.C. 7506, which provides that the Secretary shall have charge of all real estate acquired by the United States pursuant to the internal revenue laws, and may sell or lease the property, or, if the debt has been paid, release it to the debtor;

(xxv) 26 U.S.C. 7508, which provides that certain acts relating to the operation of the internal revenue laws shall be postponed because of service in a combat zone;

(xxvi) 26 U.S.C. 7602, which authorizes the Secretary to examine books and records, summon the person having the custody of books and records to appear with them, and take testimony under oath for the purpose of determining liability under the internal revenue laws;

(xxvii) 26 U.S.C. 7603, which provides for service of an administrative summons;

(xxviii) 26 U.S.C. 7604, which provides for enforcement of the summons;

(xxix) 26 U.S.C. 7605, which covers the time and place of the examination authorized in section 7602 and provides for certain restrictions on the examination;

(xxx) 26 U.S.C. 7622, which authorizes employees of the Treasury Department, designated by the Secretary, to administer oaths and affirmations and certify papers;

(xxxi) 26 U.S.C. 7701, which defines terms used throughout the rest of the title;

(xxxii) 26 U.S.C. 7805, which gives the Secretary authority to issue regulations governing enforcement of title 26, unless such authority is expressly granted to another person; and

(xxxiii) section 513 of the Act of October 17, 1940, 54 Stat. 1190, which provides for the suspension of the statute of limitations, and the collection of taxes, for persons in military service.

The Committee intends that the specialized terminology relating to tax collection in the cross-referenced provisions of the Internal Revenue Code be read, for purposes of this subchapter, as relating to the collection of a criminal fine. Thus, the term "Secretary of the Treasury" would be read as "Attorney General" and the term "tax" would be read as "fine." To carry out this intention, section 3613(c) authorizes the substitution of those terms and, in addition, authorizes the Attorney General to issue regulations for administration of fine collection which utilize appropriate terminology.

Section 3613(d) provides that a notice of a lien imposed under subsection (a) is to be considered a notice of a lien for taxes payable to the United States for the purpose of any State or local law providing for the filing of a notice of a tax lien. Because the lien created by a criminal fine is to be treated as it if were a tax lien, the filing provisions of 26 U.S.C. 6323 will apply to fines. If the Attorney General declares that State or local officials have determined that such filing is unacceptable, then 28 U.S.C. 1962, which provides for the registration, recording, docketing, or indexing of Federal court judgments, will apply instead.

SUBCHAPTER C.—IMPRISONMENT

(Sections 3621-3625)

Proposed subchapter C of chapter 229 of title 18 contains the provisions for implementation of a sentence of imprisonment imposed under subchapter D of chapter 227. The subchapter generally follows existing law, except that custody of Federal prisoners is placed in the Bureau of Prisons directly rather than in the Attorney General, thus giving the Bureau of Prisons direct authority to determine matters, such as the place of confinement of a prisoner, which are presently determined by the Attorney General. Provisions relative to the organization and responsibilities of the Bureau of Prisons are continued in chapters 301 and 303 of title 18.

SECTION 3621. IMPRISONMENT OF A CONVICTED PERSON

This section is derived from existing law.

Proposed 18 U.S.C. 3621(a) is derived from 18 U.S.C. 4082(a) except that the new provision places custody of Federal prisoners directly in the Bureau of Prisons rather than in the Attorney General. This change is not intended to affect the authority of the Bureau of Prisons with regard to such matters as place of confinement of prisoners, transfers of prisoners, and correctional programs, but is designed only to simplify the administration of the prison system. Direct custody of prisoners will be in the Bureau of Prisons, but the Director of the Bureau of Prisons will remain subject to appointment by the Attorney General [329] and subject to his direction.[330] In addition, it is made clear that the custody of the Bureau of Prisons continues until the expiration of the term of imprisonment, or until release at the expiration of that term less any time credited toward service of sentence pursuant to section 3624(b).

Proposed 18 U.S.C. 3621(b) follows existing law [331] in providing that the authority to designate the place of confinement for Federal prisoners rests in the Bureau of Prisons.[332] The designated penal or correctional facility need not be in the judicial district in which the prisoner was convicted and need not be maintained by the Federal government. Existing law provides that the Bureau may designate a place of confinement that is available, appropriate, and suitable. Section 3621(b) continues that discretionary authority with a new requirement that the facility meet minimum standards of health and habitability established by the Bureau of Prisons. In determining the availability or suitability of the facility selected, the Bureau is specifically required to consider such factors as the resources of the facility considered, the nature and circumstances of the offense, the history and characteristics of the prisoner, the statements made by the sentencing court concerning the purposes for imprisonment in a particular case,[333] any recommendations as to type of facility made by the court, and any pertinent policy statements issued by the Sentencing Commission pursuant to proposed 28 U.S.C. 994(a)(2). After considering these factors, the Bureau of Prisons may designate the place of imprisonment in an appropriate type of facility, or may transfer the offender to another appropriate facility.

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[329] 18 U.S.C. 4041.

[330] *Ibid.*

[331] 18 U.S.C. 4082(b).

[332] *United States* v. *McIntyre*, 271 F. Supp. 991, 999 (S.D.N.Y. 1967), aff'd, 396 F.2d 859 (2d Cir. 1968), cert. denied, 393 U.S. 1054 (1969).

In the absence of unusual circumstances, Federal courts currently will not review a decision as to the place of confinement.[334] The Committee, by listing factors for the Bureau to consider in determining the appropriateness or suitability of any available facility, does not intend to restrict or limit the Bureau in the exercise of its existing discretion so long as the facility meets the minimum standards of health and habitability of the Bureau, but intends simply to set forth the appropriate factors that the Bureau should consider in making the designations.

Proposed 18 U.S.C. 3621(c), dealing with delivery of the order of commitment to the person in charge of a penal or correctional facility, is drawn from existing 18 U.S.C. 4084 with little change.

Proposed 18 U.S.C. 3621(d), which is derived from 18 U.S.C. 3012, provides that the United States marshal shall, without charge, deliver a prisoner into court or return him to a prison facility on order of a court of the United States or on request of an attorney for the government.

SECTION 3622. TEMPORARY RELEASE OF A PRISONER

Proposed 18 U.S.C. 3622 is derived from 18 U.S.C. 4028(c), and permits temporary release of a prisoner by the Bureau of Prisons for specified reasons. The only criterion for such release in current law is that there be "reasonable cause to believe * * * [the prisoner] will honor his trust." Under section 3622, the release would also have to appear to be consistent with the purpose for which the sentence was imposed and with any pertinent policy statements of the Sentencing Commission, and the release would have to appear to be consistent with the public interest. These requirements emphasize factors important to the overall correctional program for the defendant, rather than the sole factor of the probability of the prisoner's return to the facility at the appropriate time.

Section 3622 (a) carries forward from current law the list of purposes for which a prisoner may be released for a period not to exceed thirty days, including visits to a dying relative, to attend the funeral of a relative, to obtain medical treatment not otherwise available, to contact a prospective employer, and to preserve or reestablish family or community ties. Authority for a limited release is also to be found in the catch-all clause at the end of the subsection, carried forward from current law, permitting release for any other significant purpose consistent with the public interest.

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[333] Proposed 18 U.S.C. 3553(b) requires a statement of reasons for imposing a sentence.
[334] See *Darcey* v. *United States*, 318 F. Supp. 1340 (W.D. Mo. 1970).

Proposed 18 U.S.C. 3622 (b) and (c) carry forward the provisions of 18 U.S.C. 4082(c)(2) permitting temporary release of an offender, while continuing in official detention at the penal or correctional facility, for work at paid employment or participation in a training program in the community on a voluntary basis. Section 3622(b) adds a new provision permitting temporary release to participate in an educational program, to make it clear that release may be for such purposes as pursuing a course of study in college as well as for vocational training. Subsection (c), relating to employment, modifies current law (18 U.S.C. 4082(c)(2)) by dropping the requirement that local unions be consulted and a provision barring work release where other workers might be displaced. While the Bureau of Prisons needs to be sensitive to the impact of its programs on the community, the Committee believes that it should have more flexibility than provided in current law in developing work programs in appropriate cases. The Committee believes that the long-range gain to the prisoner and to the community from a well-conceived work program will not adversely affect the community interests in adequate employment opportunities.

The Committee does not intend that work release under this subsection be expanded to the extent that it develops into a device for early release from prison. A sentence to imprisonment means confinement in an appropriate correctional facility with a program designed to meet the needs of the particular prisoner, considering the purposes of his sentence and his particular needs.

Subsection (c)(1) carries forward the provisions of current law that require that work in the community must be at the same rates and under the same conditions as for similar employment in the community involved. Subsection (c)(2) requires that the prisoner agree to pay costs incident to his detention as a condition of work release. Under current law, 18 U.S.C. 4082(c), the prisoner may be required to make such payments.

As with subsection (a), temporary release under subsections (b) and (c) is within the discretion of the Bureau of Prisons; there is no absolute right to work release or other outside privileges.[335] Failure to remain within the confines permitted by the release, and failure to return to the corrections facility as required, would, as under current law, be treated as an escape.[336]

SECTION 3623. TRANSFER OF A PRISONER TO STATE AUTHORITY

Proposed 18 U.S.C. 3623 delineates the circumstances under which the Director of the Bureau of Prisons must order the transfer of a Federal prisoner to a State facility prior to his release from the Federal facility. The section is derived from 18 U.S.C. 4085(a), except that language relating to appropriations is omitted as unnecessary.

Like 18 U.S.C. 4085, section 3623 provides that the Director of the Bureau of Prisons must order that a prisoner be transferred to an official detention facility within a State prior to the prisoner's release from the Federal prison if certain requirements are satisfied. First, the prisoner must have been charged in an indictment or information with a felony or have been convicted of a felony in that State. Second, the transfer must have been requested by the governor or other executive authority of the State. Next, the State must send to the Director, usually along with the request, a certified copy of the indictment, information, or judgment of conviction. Finally, the Director must find that the transfer would be in the public interest.

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[335] See *Green v. United States*, 481 F.2d 1140 (D.C. Cir. 1973).

[336] 18 U.S.C. 4082(d).

The last requirement of public interest places the entire transfer procedure directly within the discretion of the Director of the Bureau of Prisons. This granting of discretion to the Director follows closely section 3621(b) which permits the Bureau to designate the place of the prisoner's confinement, whether or not such place is maintained by the Federal Government. Under both statutes, the exercise of discretion by the Bureau will not be disturbed other than in exceptional circumstances.[337] It should be noted that at no time is it necessary for the prisoner to consent to the transfer to State authorities. Moreover, generally, a prisoner can have no valid objection to a transfer.[338]

In addition, the Committee clearly intends that the Federal Government will not lose jurisdiction of any prisoner whose Federal sentence has not expired simply because it permits a State to take the prisoner into custody under this section.[339] In most circumstances, however, the Federal Government may have to await the completion of State proceedings before regaining custody of the prisoner.

This section provides, and common sense dictates, that if more than one request from a State is presented with respect to a certain prisoner, the Director must determine which request, if any is to be honored, should be given priority. This procedure, too, is within the discretion of the Director.

Finally, the section provides that the costs of transferring a prisoner to a State authority will be borne by the State requesting the transfer.

SECTION 3624. RELEASE OF A PRISONER

Proposed 18 U.S.C. 3624(a) describes the method by which the release date of a prisoner is determined.

Section 3624(a) replaces a confusing array of statutes and administrative procedures concerning the determination of the date of release of a prisoner. Perhaps the most confusing aspect of the current law provisions is the fact that, for a regular adult prisoner whose term of imprisonment exceeds one year, there are two mechanisms for determining the release date, each of which requires recordkeeping and constant evaluation of prisoner eligibility for release. The prisoner is ultimately released on the earlier of the two release dates that result from the parallel determinations.

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[337] See *Little* v. *Swanson*, 282 F. Supp. 333 (W.D. Mo. 1968).

[338] Cf. *Konigsburg* v. *Ciccone*, 285 F. Supp. 585 (W.D. Mo. 1968), aff'd, 417 F.2d 161 (8th Cir. 1969), cert. denied, 397 U.S. 963 (1970).

[339] See *Potter* v. *Ciccone*, 316 F. Supp. 703 (W.D. Mo. 1970).

First, 18 U.S.C. 4163 requires that a prisoner who has not been released earlier, for example on parole, must be released at the expiration of his sentence less credit for good conduct.[340]

Under 18 U.S.C. 4164, if a prisoner released at the expiration of his sentence less good time has accumulated 180 days or more of good time credit, he is released as if on parole [341] and supervised for the remaining period of his sentence less 180 days.

For a prisoner whose term of imprisonment exceeds one year in length, at the same time that the Bureau of Prisons is keeping records on good time allowances, the United States Parole Commission is periodically evaluating whether the prisoner should be released on parole.

A prisoner sentenced to a term of imprisonment of not less than six months nor more than one year is released at the expiration of sentence less credit for good time, except that the judge may specify that the prisoner will be released as if on parole after serving one-third of his sentence.[342]

If the sentence of a regular adult offender is less than six months long, he is ineligible for either parole [343] or receipt of good time allowance [344] (other than industrial or meritorious good time),[345] and his release date is set by operation of law at the expiration of his term of imprisonment less any accumulated industrial or meritorious good time.[346]

There are also specialized sentencing statutes for certain young offenders for release dates to be set by the Parole Commission for all offenders who come within their terms, thus making the provisions of 18 U.S.C. 4163, relating to the release of the prisoner at the expiration of sentence less good time, inapplicable.[347]

A "youth offender" [348] given an indeterminate sentence under the Federal Youth Corrections Act [349] is immediately eligible for parole,[350] and must be released on parole before the expiration of four years from the date of conviction.[351] If the youth offender is sentenced under the Federal Youth Corrections Act to a sentence up to that permitted for the offense for a person sentenced as an adult,[352] he is likewise immediately eligible for parole,[353] and must be released at least two years before the expiration of his term of imprisonment.[354]

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[340] See 18 U.S.C. 4161 and 4162. Similar mechanisms for setting release dates would result for drug addicts sentenced pursuant to title II of the Narcotic Addict Rehabilitation Act, 18 U.S.C. 4251, even though the Act provides specialized sentencing for those prisoners. While the sentence is indeterminate (with a maximum of 10 years so long as it does not exceed the sentence otherwise available for the offense), with eligibility for conditional release as if on parole after six months, it is still possible that the prisoner will serve the full term of imprisonment less good time and be released pursuant to the provisions of 18 U.S.C. 4163.

[341] In other words, the prisoner will be subject to parole supervision upon release but his release date will not be determined by the Parole Commission.

[342] 18 U.S.C. 4205(f).

[343] 18 U.S.C. 4205 (a) and (b).

[344] See 18 U.S.C. 4161.

[345] 18 U.S.C. 4162.

[346] 18 U.S.C. 4163.

[347] However, the good time statutes may still play a role in the determination of when to release these prisoners on parole since the Parole Commission considers forfeiture of good time in determining whether a prisoner has substantially complied with the rules of the institution. However, the specialized sentencing statutes do not permit a defendant sentenced under them to be released except on parole. If the prisoner is ineligible for parole on the date on which he would ordinarily be released on parole because of forfeited good time that has not been restored, his parole release date is merely extended to any period up to the time that the law requires release on parole.

[348] 18 U.S.C. 5006(d) defines a "youth offender" as a person who is under 22 years of age at the time of conviction.

[349] 18 U.S.C. 5010(b).

[350] 18 U.S.C. 5017(a).

[351] 18 U.S.C. 5017(c).

Similar requirements for release on parole apply to young adult offenders (between 22 and 26 years old at the time of conviction) whom the judge decides to sentence pursuant to the Federal Youth Corrections Act.[355]

Proposed 18 U.S.C. 3624(a) replaces the multiplicity of release date statutes with a single provision that describes the mechanism for setting the release date. Unlike current law, two mechanisms will never be used simultaneously, thus eliminating the unnecessary confusion caused by existing requirements.

Section 3624(a) provides that a prisoner is to be released at the expiration of his term of imprisonment less any credit toward the service of his sentence for satisfactory prison behavior accumulated pursuant to subsection (b). Thus, as discussed in the introduction to this report and in connection with subchapter D of chapter 227, every sentence to a term of imprisonment will represent the actual time to be served, less good time. There will be no artificially high sentences imposed to allow for the operation of the parole system, which has no role as to prisoners sentenced under the bill.

Section 3624(a) also contains a provision which permits the Bureau of Prisons to release the prisoner on the last preceding weekday if the date of the expiration of his term of imprisonment falls on a weekend or a legal holiday. This early release is discretionary with the Bureau; nevertheless, the Bureau may not keep the prisoner incarcerated longer than his term. Therefore, if the prisoner is not released on the weekday before the weekend or legal holiday, he must be released on the Saturday, Sunday, or holiday. This subsection carries forward existing law.[356]

Proposed 18 U.S.C. 3624(b) contains the provisions concerning the earning of credit toward early release for satisfactory prison behavior. It applies only to persons who are sentenced to terms of imprisonment longer than one year, except those sentenced to life imprisonment. The duplication of effort in current law, requiring computation of good time allowances for every prisoner whose term of imprisonment is six months long or longer[357] even if the prisoner will ultimately have his release date set by the Parole Commission,[358] of course does not occur under the Committee's determinate sentencing system.

Computation of credit toward early release pursuant to section 3624(b) will be considerably less complicated than under current law in many respects. Current law provides a different rate of credit for good behavior for different lengths of prison terms,[359] while section 3624(b) provides a uniform maximum rate of 36 days a year for all time in prison beyond the first year. In addition, current law permits forfeiture or withholding of any amount of good time that has been earned up to the time of the forfeiture or withholding, and the restoration of any amount of the forfeited or withheld good time.[360] Section 3624(b) provides for automatic vesting of credit toward early release at the end of each year of satisfactory behavior, with the result that only a single year's worth of credit toward early release can be affected by a violation of the prison rules.[361] Credit for the last year would be prorated.

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[352] 18 U.S.C. 5010(c).

[353] 18 U.S.C. 5017(a).

[354] 18 U.S.C. 5017(d).

[355] See 18 U.S.C. 4216.

[356] 18 U.S.C. 4163.

[357] 18 U.S.C. 4161.

[358] The Parole Commission considers whether to release on parole any prisoner whose sentence exceeds one year in length. 18 U.S.C. 4205(a).

[359] Under 18 U.S.C. 4161, good time allowances are credited at rates of from five to ten days a month, with three rates in between, depending upon the length of the term of imprisonment.

The result of the complexity of current law provisions concerning good time allowances is to increase the uncertainty of the prisoner as to his release date, with a resulting adverse effect on prisoner morale.

Current law also probably fails to have the intended effect on maintaining prison discipline.[362] Prisoners tend to expect that good time will be restored, and it usually is. Thus, only the prisoner who has forfeited good time that has not been restored, and who is thus ineligible for parole, is actually affected by the provisions for forfeiture.

It is the belief of the Committee that the simplified provisions of section 3624(b) will have a positive effect on prisoner behavior. The credit toward early release is earned at a steady and easily determined rate that will have an obvious impact on the prisoner's release date. The rate is sufficiently high (approximately 10 percent of the part of a term of imprisonment that exceeds one year) to provide an incentive for good institutional behavior, yet not so high that it will carry forward the uncertainties as to release dates that occur under current law.

The new provisions will also be easier (and probably cheaper) to administer than those under current law. The credit toward early release will vest automatically unless the Bureau of Prisons determines that a violation of prison rules should result in withholding of some or all of the credit toward early release for a particular period. In addition, the Bureau of Prisons will have to determine the release dates for credit toward early release only for those prisoners whose time in prison will actually depend upon the credit they have earned, rather than also making this determination for prisoners whose release dates will be set by the Parole Commission.

Is should be noted that subsection (b) permits the withholding of credit toward early release only for violation of institutional disciplinary regulations that have been approved by the Attorney General and given to the prisoner. Thus, the prisoner will be put on notice as to the actions that may result in his failure to earn credit toward early release.

Proposed 18 U.S.C. 3624(c) is new. It provides that, to the extent practicable, the last ten percent of a term of imprisonment, not in excess of six months, should be spent in circumstances that afford the prisoner a reasonable opportunity to adjust to and prepare for reentry into the community.

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[360] 18 U.S.C. 4165.

[361] Of course, if a violation of rules is a criminal offense, the offense can be prosecuted in appropriate cases.

[362] See Subcommittee Criminal Code Hearings, Part XIII, at 8882 and 8894.

It is intended that the Bureau of Prisons have substantial discretion in determining what opportunity for reentry should be made available to each particular prisoner under the circumstances of his case. The Probation System is required, to the extent practicable, to offer assistance to prisoners at this pre-release stage. This will permit probation officers to assist prisoners in seeking employment and medical or social services as needed.

Proposed 18 U.S.C. 3624(d), relating to the allotment of clothing, transportation, and funds to a prisoner released at the expiration of his term of imprisonment, is derived from 18 U.S.C. 4281 and 4284, with several changes. The amount of money to be furnished a prisoner has been raised to a maximum of $500 rather than $100, and the provision of 18 U.S.C. 4284 for loans to prisoners has been omitted. The Committee has concluded that a small amount of financial assistance may be sufficient to get an offender started in the right direction, but that the $100 maximum sum permitted under existing law may often be inadequate. The loan provisions in existing law have not proved successful, having caused greater administrative costs and difficulties than the amount of money involved justifies. Accordingly, the total amount of money which can be given a prisoner has been raised to $500 with no provision for a small loan. The determination of the amount to be given each prisoner under section 3624(d) is to be made by the Director of the Bureau of Prisons, rather than the Attorney General, in keeping with other amendments placing day-to-day control of the operations of the Bureau of Prisons in the Director. A new provision has been added to specify that the Director shall make the determination of the amount to be given to a particular prisoner according to the public interest and the needs of the prisoner. The language has also been clarified to require the Director to provide a prisoner with some money unless he determines that the prisoner's financial situation is such that no money should be provided.

Finally, as under current law, the prisoner must be furnished transportation to one of three places: (1) the place of conviction; (2) his bona fide residence within the United States; or (3) any other place authorized by the Director of the Bureau of Prisons.

The Bureau of Prisons could, of course, provide transportation expenses rather than actually providing transportation, but the funds for transportation are to be in addition to the amount of money provided the prisoner under section 3624(d)(2) to assist him upon his release. This provision is essentially the same as that contained in 18 U.S.C. 4281, except that under that provision the determination of the place to which a prisoner would be transported was made by the Attorney General. In making this determination the Director will necessarily have to take cognizance of the terms and conditions of supervised release if such a term is imposed pursuant to section 3583.

Subsection (e) provides that a prisoner whose sentence includes a term of supervised release shall be released to the supervision of a probation officer. It also specifies that the term begins on the date of release and that it runs concurrently with any other term of supervised release, probation, or parole unless the person is imprisoned other than for a brief period as a condition of probation or supervised release.

SECTION 3625. INAPPLICABILITY OF THE ADMINISTRATIVE PROCEDURE ACT

This section makes clear that certain of the provisions of the Administrative Procedure Act do not apply to any determination, decision, or order of the Bureau of Prisons.[363] This result is in accord with recent case law,[364] and will assure that the Bureau of Prisons is able to make decisions concerning the appropriate facility, corrections program, and disciplinary measures for a particular prisoner without constant second-guessing. The provision, of course, would not eliminate, and is not intended to eliminate, constitutional challenges by prisoners under the appropriate provisions of law. Constitutional requirements in personal disciplinary actions have been established by the Supreme Court.[365] The Committee feels that there is no need to add additional due process procedures to those specified by the courts. The sections of the APA made inapplicable to the Bureau of Prisons are parallel to those currently made inapplicable to the Parole Commission.

The phrase "determination, decision, or order" is intended to mean adjudication of specific cases as opposed to promulgation of generally applicable regulations.

Section 2(a)(4) of the bill creates a new section 3673 of title 18 that defines terms used in proposed chapters 227 and 229 of title 18, United States Code.

Section 2(a)(5) of the bill adds a caption and sectional analysis for chapter 232 of title 18, United States Code, the chapter created from the sections of title 18 redesignated by section 2(a)(1) of the bill.

Section 2(b) contains technical amendments to the chapter analysis of part II of title 18, United States Code, necessitated by the bill.

Section 3(a) of the bill adds to chapter 235 of title 18, United States Code, a new section 3742, relating to appellate review of sentences.

SECTION 3742. REVIEW OF A SENTENCE

1. In general

This section establishes a limited practice of appellate review of sentences in the Federal criminal justice system. The Committee is especially indebted to the work of former Senator Roman L. Hruska for the contents of this section. He has led a long and steadfast effort to introduce appellate review of sentencing—an effort stretching back over several Congresses.[366]

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[363] 5 U.S.C. 554 and 555 and 701 through 706. The APA continues to apply to regulation-making authority of the Bureau of Prisons. See *Ramer* v. *Saxbe*, 522 F.2d 695 (D.C. Cir. 1975).

[364] See *Clardy* v. *Levi*, 545 F.2d 1241 (9th Cir. 1976) (APA not applicable to prison discipline proceedings); *Wolfish* v. *Levi*, 573 F.2d 118, 125 (2d Cir. 1978) (determinations of Bureau of Prisons are discretionary agency action so no need to reach question whether APA applies to them), reversed on other grounds *sub nom. Bell* v. *Wolfish*, 441 U.S. 520 (1979).

[365] See *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), and *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976).

[366] See Subcommittee Criminal Code Hearings, Part III, at 1568–74.

Appellate courts have long followed the principle that sentences imposed by district courts within legal limits should not be disturbed.[367] The sentencing provisions of the reported bill are designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court. At the same time, they are intended to afford enough guidance and control of the exercise of that discretion to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing. Section 3742 accommodates all of these considerations by making appellate review of sentences available equally to the defendant and the government, and by confining it to cases in which the sentences are illegal, are imposed as the result of an incorrect application of the sentencing guidelines, or are outside the range specified in the guidelines and unreasonable.

It is an anomaly to provide for appellate correction of prejudicial trial errors and not to provide for appellate correction of incorrect or unreasonable sentences.[368] The reason given for unavailability of appellate review of sentences under current law is the fact that sentencing judges have traditionally had almost absolute discretion to impose any sentence legally available in a particular case. In doing so, the judges have not been required to state reasons for their decisions,[369] and rarely have done so. Thus, even if appellate review of sentences were available under current law, the courts of appeals would have difficulty assessing the reasonableness of a sentencing decision since they would be unable to tell in many cases why the sentences in two apparently similar cases were different.

The systematized sentencing system introduced by this bill, including the use of sentencing guidelines promulgated by a newly created Sentencing Commission, as provided in proposed chapter 58 of title 28, United States Code, should do much to eliminate unwarranted disparities in Federal sentences. Yet each offender stands before a court as an individual, different in some ways from other offenders. The offense, too, may have been committed under highly individual circumstances. Even the fullest consideration and the most subtle appreciation of the pertinent factors—the facts in the case; the mitigating or aggravating circumstances; the offender's characteristics and criminal history; and the appropriate purposes of the sentence to be imposed in the case—cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable but desirable.

It is expected that most sentences will fall within the ranges recommended in the sentencing guidelines. Only if a judge believes that there is an offense or offender characteristic, not adequately considered by the Sentencing Commission, that justifies a sentence different from that provided in the applicable guideline should the judge deviate from the guideline's recommendation. If the sentence differs from the guidelines sentence, the judge is required to state specific reasons for the sentence outside the guideline. Because sentencing judges retain the flexibility of sentencing outside the guidelines, it is inevitable that some of the sentences outside the guidelines will appear to be too severe or too lenient.

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[367] An exception is contempt. See *Green* v. *United States,* 356 U.S. 165 (1958); *United States* v. *Bukowski,* 435 F.2d 1094 (7th Cir. 1970), cert. denied, 401 U.S. 911 (1971). Two additional exceptions are 18 U.S.C. 3576 and 21 U.S.C. 849(h).

[368] See Subcommittee Criminal Code Hearings, Part VI, at 5649-53 (statement of the Hon. Marvin E. Frankel). Illegal sentences are subject to correction today pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

[369] See *United States* v. *Dorszynski,* 418 U.S. 424 (1974) (relating to Youth Corrections Act).

Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines. This, in turn, will assist the Sentencing Commission in refining the sentencing guidelines as the need arises. For example, if the courts found that a particular offense or offender characteristic that was not considered, or not adequately reflected, in formulation of the guidelines was an appropriate reason for imposing sentences that differed from those recommended in the guidelines, the Sentencing Commission might wish to consider amending the guidelines to reflect the factor.

Although some persons have challenged the wisdom and validity of permitting an appeal of a sentence by the government, the Committee is convinced that neither objection has merit.

It is clearly desirable, in the interest of reducing unwarranted sentence disparity, to permit the government, on behalf of the public, to appeal and have increased a sentence that is below the applicable guideline and that is found to be unreasonable. If only the defendant could appeal his sentence, there would be no effective opportunity for the reviewing courts to correct the injustice arising from a sentence that was patently too lenient.[370] This consideration has led most Western nations to consider review at the behest of either the defendant or the public to be a fundamental precept of a rational sentencing system, and the Committee considers it to be a critical part of the foundation for the bill's sentencing structure. The unequal availability of appellate review, moreover, would have a tendency to skew the system, since if appellate review were a one-way street, so that the tribunal could only reduce excessive sentences but not enhance inadequate ones, then the effort to achieve greater consistency might well result in a gradual scaling down of sentences to the level of the most lenient ones. Certainly the development of a principled and balanced body of appellate case law would be severely hampered.

With respect to validity, it is clear that a system, such as is provided by the reported bill, in which sentence increase is possible as a consequence of sentence review initiated by the government, is not objectionable on constitutional grounds. Title X of the Organized Crime Control Act of 1970 includes a provision (18 U.S.C. 3576) permitting a sentence imposed under the dangerous special offender provision to be increased upon appeal by the United States.[371] The Supreme Court in *United States* v. *DiFrancesco*[372]

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[370] This would be the case even if the appellate court were authorized to augment (as well as diminish) the sentence, since it is unlikely that a defendant would choose to appeal, on the basis of alleged excessiveness, a sentence deemed by the reviewing court as so inadequate as to warrant enhancement. Such a system, moreover, places an undesirable strain on the defendant's right to seek sentence review. For these reasons, *inter alia*, such a scheme was rejected by the Committee.

[371] 21 U.S.C. 849 contains a similar provision as to dangerous special drug offenders.

[372] 449 U.S. 117 (1980). The Committee does not view the decision in *Bullington* v. *Missouri*, 451 U.S. 430 (1981), as undermining the validity of the sentence review procedures set forth in

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held that the authority contained in that statute for government appeal of sentence did not violate the double jeopardy clause. According to the Court:

> The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence. We have noted * * * the basic design of the double jeopardy provision, that is, as a bar against repeated attempts to convict with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent. These considerations however, have no significant application to the prosecution's statutorily granted right to review a sentence. This limited appeal does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence. Under § 3576, the appeal is to be taken promptly and is essentially on the record of the sentencing court. The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired. To be sure, the appeal may prolong the period of any anxiety that may exist, but it does so only for the finite period provided by the statute. The appeal is no more of an ordeal than any Government appeal under 18 U.S.C. § 3731 from the dismissal of an indictment or information. The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him. The defendant is subject to no risk of being harassed and then convicted, although innocent. Furthermore, a sentence is characteristically determined in large part on the basis of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversary in nature.[373]

The Court also held that there was no double jeopardy problem with the fact that the defendant's sentence could be increased on successful government appeal of the sentence, making clear that the bar against double punishments applied to a total punishment in excess of the statutory maximum for the offense, not to an increase in the sentence within statutory limits.[374] Finally, the Court noted the growing criticism of arbitrary sentencing practices, and indicated that "Appellate review creates a check upon this unlimited power, and should lead to a greater degree of consistency in sentencing.[375]

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proposed 18 U.S.C. 3742, as has been argued by the ABA. (See Criminal Code Hearings, Part XVI, at 11891-907 (letter from George C. Freeman, Jr.).) That case involved a sentencing proceeding in a death penalty case in which the jury, in a proceeding separate from the trial, found that the prosecution had not proved beyond a reasonable doubt, as required by law, that aggravating factors required to be found to exist before the death penalty could be imposed, existed. The Supreme Court, in a 5 to 4 decision, found these findings by the jury to be, in effect, a jury finding that the defendant was acquitted of the aggravating factors necessary for imposition of a death sentence. *Id.* at 445. The Supreme Court distinguished the proceeding from other sentencing proceedings, which it has held not to be violations of double jeopardy, by noting the prosecution's burden of establishing new facts beyond a reasonable doubt in order to assist the jury in making a determination between two alternatives, a requirement that "*explicitly requires* the jury to determine whether the prosecution has proved its case!" *Id.* at 444 [emphasis in original].

[373] *United States* v. *DiFrancesco, supra* note 372 at 136-137.

[374] *Id.* at 138-39, distinguishing *Ex parte Lange*, 18 Wall. 163 (1874).

[375] *Id.* at 142-143, citing M. Frankel, *Criminal Sentences: Law Without Order* (1973) and P. O'Donnell, M. Churgin, and D. Curtis, *Toward a Just and Effective Sentencing System* (1977).

2. Provisions of the bill, as reported

Section 3742 sets forth procedures for appeal in three cases: appeal of a sentence imposed in violation of law, appeal of a sentence that reflects an incorrect application of the sentencing guidelines promulgated pursuant to proposed 28 U.S.C. 994(a)(2); appeal of a sentence outside the guidelines; and appeal of a sentence in a case in which there is no guideline applicable to the offense committed. Either the defendant or the government may appeal a sentence imposed in violation of law, or through incorrect application of the guidelines, or imposed in the absence of an applicable guideline. The defendant may also appeal a sentence above the guidelines to the extent that it includes a greater fine or term of imprisonment or term of supervised release than the maximum provided in the applicable guideline, or to the extent that it includes a more limiting probation condition or condition of supervised release under 18 U.S.C. 3563(b)(6)[376] or (b)(11)[377] than the maximum provided in the guidelines. Conversely, the government may appeal, on behalf of the public, a sentence below the applicable guideline to the extent that it includes a lesser fine or term of imprisonment or term of supervised release than the minimum in the guideline or a less limiting condition of probation or supervised release under 18 U.S.C. 3563(b)(6) or (b)(11) than recommended in the guideline. Of course, a sentence consistent with a plea agreement cannot be appealed.

Under sections 3742(a)(3)(B) and (b)(3)(B) both the defendant and the government may appeal a sentence where there is no guideline for the provision of law that the defendant has been convicted of violating. This would include the situations where there is a new law for which no guideline has yet been developed and where an appellate court had invalidated the established guideline and no replacement had yet been determined. A sentence not subject to a guideline is, therefore, open to broad appeal by both sides.

In previous versions of the bill, appeal of sentence was limited to felonies and Class A misdemeanors. The bill as reported provides for appeal in all cases which meet the criteria for appeal.

The Committee agrees with the Judicial Conference that a defendant who is imprisoned for a minor offense pursuant to an above-guideline sentence, would gain little comfort from knowing that he had been denied appellate rights because the offense for which he has been imprisoned is relatively minor.[378]

The sentence review process under section 3742 begins under subsections (a) and (b) with the filing of notice of appeal of sentence with the district court. The government may petition for review of a sentence only with the personal approval of the Attorney General or the Solicitor General in order to assure that such appeals are not routinely filed for every sentence below the guidelines.

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[376] Proposed 18 U.S.C. 3563(b)(6) permits as a condition of probation or supervised release the barring of an individual from engaging in a business or profession related to his offense and restrictions relevant to the offense on the manner in which an individual or organization conducts a business or profession. See proposed 18 U.S.C. 3583.

[377] Proposed 3563(b)(11) permits as a condition of probation the incarceration of a defendant for evenings or weekends or other intervals of time in the first year of a sentence.

[378] Crime Control Act Hearings (statement of Judge Gerald B. Tjoflat, pp. 7-8).

The limitations on both defendant and government appeal of sentences outside the guidelines based upon the size of the sentence imposed are further restrictions on the use of appellate review of sentences in order to avoid unnecessary appeals. Clearly, sentences at the bottom range are less likely to be abusive to defendants. The same applies to the government when sentences imposed approach the upper range of sentences recommended. The guidelines, therefore, provide a practical basis for distinguishing the cases where review is most needed from those where appeal would most likely be frivolous.

Both sections 3742(a) and 3742(b) refer to the sentence being appealed as an "otherwise final sentence." This language is in accord with the provisions of sections 3562(b), 3572(c), and 3582(b) regarding reviewability of sentences. Those sections make clear that a sentence to a fine, to a term of imprisonment, or to a term of probation is final except to the extent that it may be modified or corrected through subsequent court action. The Committee intends that a sentence be subject to modification through the appellate process, although it is final for other purposes.[379]

Under subsection (c), the clerk of the court that imposed the sentence shall certify to the court of appeals that portion of the record in the case that is designated as pertinent by either of the parties, the presentence report, and information submitted during the sentencing proceeding, including the court's statement of reasons as called for by section 3553(b).

Under subsection (d), upon review of the record, the court of appeals is to determine whether the sentence was imposed in violation of law; was imposed as a result of an incorrect application of the sentencing guidelines; or is outside the guidelines and is unreasonable, having regard for: (1) the factors to be considered in imposing a sentence, as set forth in chapter 227, and (2) the reasons for the sentence stated by the sentencing court.

Under subsection (e), if the court of appeals finds that the sentence was not imposed in violation of law, or as a result of incorrect application of the guidelines, and is not unreasonable, it is to affirm the sentence.

If the court determines that the sentence was imposed in violation of law or as a result of an incorrect application of the guidelines, it is required to remand the case for further sentencing proceedings or correct the sentence.

Finally, if the court determines that a sentence outside the guidelines is unreasonable and too high, and the appeal was filed by the defendant, it is to set aside the sentence and either impose a lesser sentence, remand for imposition of a lesser sentence, or remand for further sentencing proceedings.

If the court determines that a sentence outside the guidelines is unreasonable and too low, and the appeal was filed by the government, the court is to set aside the sentence and either impose a greater sentence, remand for imposition of a greater sentence, or remand for further sentencing proceedings. It should be noted that a sentence cannot be increased upon a section 3742(a)(3) appeal by the defendant.

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[379] See *United States* v. *DiFrancesco*, *supra* note 372 at 136–137.

As to the procedures to be followed, the Committee intends that the Federal Rules of Appellate Procedure be applicable to a proceeding under this section. Many of these rules will be applicable as they now exist; others may need modification. The Committee expects that the Judicial Conference and its Advisory Committees will issue specific proposed amendments to cover the details of these procedures where necessary.

The Committee believes that section 3742 creates for the first time a comprehensive system of review of sentences that permits the appellate process to focus attention on those sentences whose review is crucial to the functioning of the sentencing guidelines system, while also providing adequate means for correction of erroneous and clearly unreasonable sentences.[380]

Section 3(b) of the bill contains a technical amendment to the sectional analysis of chapter 235 of title 18.

Section 4 of the bill amends chapter 403 of title 18, United States Code, relating to juvenile delinquency, in order to conform it to the changes made in adult sentencing laws.

Section 4(a) of the bill amends section 5037 of title 18, United States Code, by replacing current subsections (a) and (b), relating to disposition after a finding of juvenile delinquency, with the disposition provisions from S. 1630 in the 97th Congress.[381]

Under proposed 18 U.S.C. 5037(a), if the court finds that a juvenile is a juvenile delinquent, the court is required to hold a disposition hearing within 20 days after the juvenile delinquency hearing. After the disposition hearing, the court may suspend the finding of juvenile delinquency, enter an order of restitution pursuant to section 3556, place the juvenile on probation, or commit him to official detention. The provisions of chapter 207 of title 18 are specifically made applicable to the decision whether to release or detain the juvenile pending an appeal or a petition for a writ of certiorari after the disposition.

Proposed 18 U.S.C. 5037(b) sets forth the probation terms for juveniles. If the juvenile is less than 18 years old, the probation term may not extend beyond the date when the juvenile becomes 21 or the maximum term that would be authorized under the adult probation statute if the juvenile had been tried and convicted as an adult. If the juvenile is between 18 and 21, the probation may not extend beyond three years or the maximum that would be authorized for an adult, whichever is less.

Proposed 18 U.S.C. 5037(c) provides the maximum periods for official detention of a juvenile found to be a juvenile delinquent. It parallels the 1974 Act provision set forth in current law for juveniles under 18 at the time of the proceeding. However, for juveniles between the ages of 18 and 21 at the time of the proceeding, the bill specifies that the term of official detention for a Class A, B, or C felony is a maximum of five years or the maximum sentence applicable to an adult offender.

Section 4(b) of the bill repeals section 5041 of title 18, United States Code, in light of the abolition of the parole system in Federal law. The section describes the role of the parole system in determining release dates under current law. It is expected that the time set at the disposition hearing for a juvenile placed in the custody of the Attorney General pursuant to 18 U.S.C. 5037(b) will represent the real time to be spent by the juvenile in a manner similar to that for adult offenders under the bill.

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[380] See Subcommittee Criminal Code Hearings, Part XIII, at 8608, 8873, 8887, and 8953.

[381] See S. Rept. No. 97-307, at 1184-89.

Section 4(c) amends section 5042 of title 18, relating to parole and probation revocation, by striking out references to parole and parolees.

Section (d) amends the sectional analysis of chapter 403 of title 18 to accord with the other amendments made by section 204.

Section 5 of the bill contains a number of amendments to the Federal Rules of Criminal Procedure that are necessitated by the amendments to the sentencing provisions.

Section 5(a) of the bill makes several changes in Rule 32, mostly to conform it to changes in the sentencing laws made by the bill. Certain provisions now found in current 18 U.S.C. 3653 have also been added to this rule in a revised form.

Subdivision (a)(1) of Rule 32, relating to the sentencing hearing, modifies the current requirement that a sentence be imposed without unnecessary delay by permitting the court, upon a joint motion of the defendant and the Government, to postpone the imposition of sentence for a period reasonably necessary to resolve an unresolved factor important to the sentencing determination. Such factors as cooperating with the Government, testifying against a codefendant, acting as an undercover agent, as well as providing otherwise unavailable information, may be important to the sentencing decision. This modification recognizes the interests of all concerned in weighing such factors prior to the sentencing hearing whenever possible. In addition, subdivision (a)(1) is amended to require that the court specify in open court and before imposing sentence the categories established in the sentencing guidelines promulgated by the Sentencing Commission that it believes apply to the defendant. Before imposing the sentence the court must also determine that the defendant and his attorney had sufficient time and opportunity to read and discuss the presentence investigation report. The court must give the defendant's counsel an opportunity to speak on his behalf and must also inquire of the defendant personally if he would like to make a statement on his own behalf or present any mitigating information.

Subdivision (a)(2) of the rule, as now in effect, imposes a duty upon the court to advise the defendant of his right to appeal in a case which has gone to trial on a plea of not guilty, but does not impose any such duty following a plea of guilty or nolo contendere. This basic approach is continued in subdivision (a)(2) of the amended rule with an addition made by section 5(a)(2) of the bill to cover the matter of advice regarding the defendant's right, if any, to obtain review of his sentence.

Subdivision (c) of the rule as now in effect governs the making of presentence investigations and reports prior to the imposition of sentence or "the granting of probation." It is no longer appropriate to treat sentencing and the granting of probation separately. Under proposed subchapter B of chapter 227 of title 18, the procedure of suspending the imposition or execution of sentence before placing a defendant on probation[382] has been abolished—probation has become a sentence in and of itself. Accordingly, Rule 32(c) has been rewritten to delete references to the granting of probation. However, the law is unchanged in that "sentence" is used in the rule to the same effect. For similar reasons this revised rule omits the reference now appearing in subdivision (d) to suspending the imposition of sentence.

Subdivision (c)(1) of Rule 32 is amended by section 5(a)(4) of the bill to require that a probation officer make a presentence investigation and report before imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553. This change is necessitated by the fact that it is essential that the judge have all the information he needs in order accurately to apply the sentencing guidelines. It is expected that the sentencing judge will ordinarily wish the sentencing report to be prepared to assist him in his sentencing decision.

Subdivision (c)(2) of Rule 32 is amended by section 5(a)(5) of the bill to spell out in some detail the information that should be included in the presentence report in order to assure the accurate application of the guidelines. This amendment assures that the information relating to the requirements of the sentencing guidelines system is contained in the presentence report. That part of Rule 32(c) relating to the contents of the presentence report has been substantially expanded from current law to provide that the report will contain, in addition to the information concerning the history and characteristics of the defendant (including his prior criminal record, if any, his financial condition, and any behavior characteristics pertinent to sentencing), the classification of the offense and defendant under the sentencing guidelines that the probation officer believes are applicable to the defendant, the kinds of sentence and the sentencing range under the guidelines that apply to those classifications, and any aggravating or mitigating circumstances the probation officer believes may indicate that a lower or higher sentence or a sentence of a different kind than that specified in the guidelines should be imposed.

Unless the court orders otherwise, possible nonprison programs available and appropriate for the defendant should be included in the report.

The bill also carries forward from the Victim and Witness Protection Act of 1982, requirements that the presentence report include information concerning harm, including financial, social, psychological, and physical harm, done to or loss suffered by the victim, and concerning restitution needs of the victim. The presentence report should also contain any policy statement of the Sentencing Commission pertinent to imposition of sentence on the defendant.

Subdivision (c)(3)(A) of Rule 32 has been amended by section 5 (a)(6) of the bill to assure that the information relating to the requirements of revised subdivision (c)(2) contained in the presentence report are made available to the defendant, but that the probation officer's final recommendation as to sentence is not made

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[382] Current 18 U.S.C. 3651.

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available. This assures that the defendant will receive information such as the probation officer's conclusions as to which guidelines apply to the defendant and whether there are aggravating or mitigating circumstances that may indicate that the sentence should be outside the guidelines, but will not receive the final sentencing recommendation of the probation officer. The latter provision represents a Committee amendment in the 97th Congress to S. 1630 made at the suggestion of Judge Tjoflat[383] who expressed concern that disclosure of the final sentencing recommendation might inhibit the probation officer in making the recommendations.

Section 5(b) amends Rule 35 of the Federal Rules of Criminal Procedure in order to accord with the provisions of proposed section 3742 of title 18 concerning appellate review of sentence. New subdivision (a) requires the court to correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the guidelines, or to be unreasonable. New subdivision (b) permits the court, on motion of the government, to lower a sentence within one year after its imposition to reflect a defendant's subsequent, substantial assistance in the investigaton or prosecution of another person who has committed an offense, to the extent that such assistance is a factor recognized in applicable guidelines or policy statements issued by the sentencing Commission.

Section 5(c) amends Rule 38 of the Federal Rules of Criminal Procedure in order to make technical changes necessitated by the enactment of provisions for appellate review of sentence.

At present, Rule 38 provides for the staying of sentences of death, imprisonment, the payment of a fine, and of an order placing a defendant on probation, "if an appeal is taken." Each of the relettered subdivisions of Rule 38 has been written to allow for stay of sentence if an appeal is taken from a conviction or a sentence. Moreover, since probation has been cast as a sentence, the phrase, "sentence of probation," has been used in subdivision (d) instead of "an order placing the defendant on probation." A new subdivision (e) has been added providing for a stay of sentence under section 3554 (Order of Criminal Forfeiture), 3555 (Order of Notice to Victims), or 3556 (Order of Restitution) if an appeal of the sentence is filed. The subdivision permits the court to issue reasonably necessary protective orders. Finally, a new subdivision (f) is added to stay a civil or employment disability arising under a Federal statute if it is appealed and to permit the court to take action necessary to protect the interest sought to be protected by the imposition of the disability pending disposition of the appeal.

Section 5(d) of the bill makes a correction in a cross-reference in Rule 40 of the Federal Rules of Criminal Procedure.

Section 5(e) of the bill amends Rule 54 to redefine the term "petty offense" in subdivision (c) to refer to the grading of offenses prescribed by proposed section 3583 of title 18, and to add a definition of the word "grade" that specifies that the word grade includes the issue whether, for the purposes of section 3571 (relating to the sentence of fine), a misdemeanor resulted in the loss of human life.

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[383] Criminal Code Hearings, Part XVI, at 11921-22.

Section 5(f) of the bill amends the table of rules of the Federal Rules of Criminal Procedure to accord with the other amendments to the rules.

Section 6 contains a number of technical amendments to the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates to take into account the new grading structure for Federal offenses.

Section 7(a) of the bill adds a new chapter 58 to title 28 of the United States Code. That chapter creates the United States Sentencing Commission and outlines its functions.

CHAPTER 58 OF TITLE 28.—UNITED STATES SENTENCING COMMISSION

SECTION 991. UNITED STATES SENTENCING COMMISSION; ESTABLISHMENT AND PURPOSE

Proposed section 991 of title 28, United States Code, creates the United States Sentencing Commission and spells out its purposes. The Commission is established as an independent commission in the judicial branch, consisting of seven voting members appointed by the President by and with the advice and consent of the Senate. The Attorney General, or his designee, is an ex officio non-voting member of the Commission. Placement of the Commission in the judicial branch is based upon the Committee's strong feeling that, even under this legislation, sentencing should remain primarily a judicial function. At the same time, however, the Committee believes that sentencing policy should be formulated after examining a wide spectrum of views.

In order to assure a broadly representative membership on the Sentencing Commission, the Committee has provided that the President will select the members after consulting with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process. At least two of the members shall be Federal judges in regular active service selected from a list of six recommended candidates prepared for the President by the Judicial Conference of the United States.

This requirement that two of the Commission members be active Federal judges was included at the request of the Judicial Conference. The Committee had anticipated that some number of members of the Sentencing Commission would be judges. This amendment clarifies that intent.

The Chairman is to be appointed as such, and will remain for the duration of his term unless removed from office for malfeasance or neglect of duty.[384] All voting members are removable from the Commission by the President for malfeasance in office or neglect of duty.

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[384] If the President wished to name another person as Chairman at the expiration of the Chairman's first term, but wished to retain the Chairman as a member of the Commission, he could appoint a new Chairman and reappoint the former Chairman as a member of the Commission.

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In addition to the seven voting members, the Commission will have one permanent non-voting ex officio member, the Attorney General or his designee, and, under the provisions of section 25(b)(5) of this title, one temporary non-voting ex officio member, the Chairman of the United States Parole Commission.

The Commission should be a body which can cooperate in the promulgation of clear and consistent sentencing policy. By requiring consultation with various groups as to potential members of the Commission, it can be expected that they will represent some diversity of backgrounds.

The extraordinary powers and responsibilities vested in the Commission, as well as the enormous potential for unparalleled improvement in the fairness and effectiveness of Federal criminal justice as a whole, demand the highest quality of membership. For such a critical position, Presidential appointments based on politics rather than merit would, and should, be an embarrassment to the appointing authority. The Committee is convinced that without superior and professional members the Commission, and indeed sentencing reform, can never achieve the progress so sorely needed.

The Committee intends, and the important functions to be served by the Sentencing Commission require, the appointment and designation of highly qualified members to the Commission. Because of the complex nature of the functions of the Commission, and in order to avoid potential schedule conflicts for the members, the voting members' positions are full-time for the first several years [385] even if the member is a Federal judge.[386]

The Committee anticipates that the voting members of the Commission will form a number of committees which will have specific delegated responsibilities such as, for example, review of the effectiveness of probation and post-release supervision in carrying out the purposes of sentencing, monitoring of the application of the sentencing guidelines and policy statements, continuing refinement of the guidelines and policy statements, development of legislative proposals in the sentencing area, development and coordination of research studies (including, for example, basic research on sentencing theories as well as applied research on the effectiveness of certain policies), and review of the effectiveness of corrections programs of the Bureau of Prisons in carrying out the purposes of sentences of imprisonment. Such committees could be an invaluable source for developing recommendations for Commission action and for providing the information necessary for informed decisionmaking.

Subsection (b) sets out the two basic purposes of the Sentencing Commission. The most important purpose of the Commission is the establishment of sentencing policies and practices for the Federal criminal justice system that are designed to meet three goals.

First, the policies and practices established should assure that, to the maximum extent possible, the Federal sentencing practices and policies carry out the four purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code. These purposes are deterrence, protection of the public from further crimes by the defendant, assurance of just punishment, and promotion of rehabilitation.

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[385] The judicial and other members may complete work on cases in progress if they are so far involved that it is impractical for the work to be turned over to another person. Of course, if the work was such that there was a potential conflict of interest or appearance of such a conflict, the work would have to be turned over to someone else.

[386] Pursuant to section 992(c), a Federal judge need not resign his appointment as a Federal judge while serving as a member of the Sentencing Commission.

Second, the policies and practices are required to provide certainty and fairness in meeting the purposes of sentencing. In doing so, the policies and practices are required to avoid "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." This requirement establishes two factors—the prior records of offenders and the criminal conduct for which they are to be sentenced—as the principal determinants of whether two offenders' cases are so similar that a difference between their sentences should be considered a disparity that should be avoided unless it is warranted by other factors. The key word in discussing unwarranted sentence disparities is "unwarranted." The Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records. The Commission is, in fact, required to consider a number of factors in promulgating sentencing guidelines to determine what impact on the guidelines, if any, would be warranted by differences among defendants with respect to those factors.[387] As discussed in the introduction of this report, the Committee believes that the sentencing guidelines system will enhance, rather than detract from, the individualization of sentences. Each sentence will be the result of careful consideration of the particular characteristics of the offense and the offender, rather than being dependent on the identity of the sentencing judge and the nature of his sentencing philosophy.

Third, the sentencing policies and practices are required, to reflect, to the extent practicable, advancement in knowledge of human behavior in the context of the criminal justice process. This is an explicit recognition of the unfortunate fact that we do not know very much about how to deter criminal conduct or rehabilitate offenders. It also makes clear that the purposes set forth in subsection (b) are the goals to be reached by the sentencing process and that they cannot be realistically assured in every case. Subsection (b)(1)(C) is designed to encourage the constant refinement of sentencing policies and practices as more is learned about the effectiveness of different approaches.

The second basic purpose of the United States Sentencing Commission is to develop means of measuring the effectiveness of different sentencing, penal, and correctional practices in meeting the purposes of sentencing set forth in section 3553(a)(2) of title 18. This provision emphasizes the importance of sentencing and corrections research in the process of improving the ability of the Federal criminal justice system to meet the goals of sentencing.

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[387] 28 U.S.C. 994(d).

SECTION 992. TERMS OF OFFICE; COMPENSATION

Subsection (a) sets up a staggered system of appointments for the chairman and voting members of the Commission such that, once in operation, the Commission membership will be replaced, or reappointed, over a period of six years—at least two members, or one member and the chairman, every two years. This is achieved by making the initial appointments for three members to only four-year terms, and for two other members to only two-year terms, while the first chairman and one member serve full six-year terms. This staggered system should provide a desirable balance between continuity and the innovation and new perspectives that can come with a change in membership. Note that section 25(a) of the bill provides that while the rest of the Act shall become effective twenty-four months after the date of enactment, the Sentencing Commission is created immediately or on October 1, 1983, whichever occurs later. It also provides that for the purpose of determining when the initial terms end, the terms of the first members of the Commission shall not begin to run until the effective date of the sentencing guidelines; thus, the members appointed for the initial abbreviated terms of two or four years will not have their terms expire until two or four years after the new sentencing guidelines go into effect, and the members and chairman appointed to serve full six-year terms will count the effective date of the sentencing guidelines as the beginning of the term even though they may have actually been in office two years prior to that date. The delay is also a recognition that the initial appointments may occur at different times in spite of the desirability of expeditious appointments, and will permit all later appointment terms to run from an anniversary of the effective date of the guidelines.

Subsection (b) provides that a voting member may serve no more than two full terms, and that a member appointed to serve an unexpired term shall serve only the remainder of such a term. This also means that if a voting member is appointed to a term after it begins, and it has been vacant during the expired part, such member will also serve only the remainder of a term. If one of the original Commissioners appointed to an abbreviated two- or four-year term were reappointed, he could be reappointed a second time as well since the initial term was not a full term.

Subsection (c) establishes that the Sentencing Commission will be full-time during the first six years after the guidelines go into effect, after which all voting members will hold part-time positions, except for the Chairman, whose position remains full-time. The Chairman is to be compensated at the same annual rate as judges for the courts of appeals, as are the other voting members during the initial six years when their positions are full-time. When the Commission becomes part-time, voting members other than the Chairman shall be paid at the daily rate at which court of appeals judges are compensated.

In this Congress, the Committee decided that the Sentencing Commission should ultimately be part-time. This decision was made out of concern for the costs of maintaining a permanent full-time commission and the belief that once the initial guidelines are established and operating the responsibilities of the Commission can be discharged by part-time members. The State of Minnesota, which has experienced the greatest success among States which have adopted sentencing reform, has had a part-time Sentencing Commission since the inception of the Commission. The relatively greater magnitude of the task of developing Federal sentencing policies and guidelines demands a full-time effort through the implementation of the initial guidelines.

The bill specifically authorizes a Federal judge to be appointed as a member of the Commission without having to resign his appointment as a Federal judge. The Committee feels that this is appropriate since the judge will remain in the judicial branch and will be engaged in activities closely related to traditional judicial activities, and that such a provision is necessary to assure that highly qualified candidates are not routinely excluded in practice because of the substantial burden of having to resign a lifetime appointment in order to serve on the Sentencing Commission.

The non-voting ex officio members would, of course, receive no extra compensation for their roles on the Commission, but would receive travel expenses authorized by their agency if necessary to the performance of their duties with regard to the Commission.

SECTION 993. POWERS AND DUTIES OF CHAIRMAN

Section 993 provides that the Chairman, who is appointed as such by the President, with the advice and consent of the Senate, pursuant to section 991(a), is to call and preside at meetings of the Sentencing Commission. After the Commission becomes part-time meetings shall be held for at least two weeks in each quarter of the year. The Chairman must also direct the preparation of appropriations requests and the use of funds by the Sentencing Commission.

SECTION 994. DUTIES OF THE COMMISSION

Subsection (a) requires the Sentencing Commission to promulgate sentencing guidelines and policy statements to be used by the sentencing judges in determining the appropriate sentence in a particular case. The sentencing guidelines and policy statements are to be promulgated pursuant to the rules and regulations of the Sentencing Commission [388] and must be consistent with all pertinent provisions of titles 18 and 28. Guidelines and policy statements must be adopted by the affirmative vote of at least four members of the Commission. Under subsection (a)(1)(A), the guidelines are required to provide guidance for the judge in determining whether to sentence a convicted defendant to probation, to pay a fine, or to a term of imprisonment. This guidance may prove to be one of the most important parts of the guidelines process, since current law provides no guidance or mechanism for guidance to judges on this crucial decision, leading to considerable unwarranted disparity which there is no mechanism to correct. The Parole Commission is now able to alleviate some of the disparity among sentences to terms of imprisonment; however, it has no jurisdiction to eliminate disparity among decisions whether or not to sentence convicted defendants to terms of imprisonment. The disparity is illustrated by the data in the following chart from the book, *Toward a Just and Effective Sentencing System*:[389]

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[388] See 28 U.S.C. 995(a)(1).

TABLE 2.—PERCENTAGE OF CONVICTED OFFENDERS PLACED ON PROBATION, 1972

	Homicide and assault	Robbery	Burglary	Larceny	Auto theft	Forgery and counterfeiting
National average	36	13	43	60	36	58
Maine				50 (−10)	0 (−36)	20 (−38)
Massachusetts	14 (−22)	17 (+4)	0 (−43)	77 (+17)	50 (+14)	53 (−5)
New York (northern)	100 (+64)	50 (+37)		54 (−6)	83 (+47)	62 (+4)
New York (eastern)	60 (+24)	16 (+3)	50 (+7)	52 (−8)	89 (+53)	62 (+4)
New Jersey	80 (+44)	6 (−7)	20 (−23)	64 (+4)	60 (+24)	66 (+8)
Pennsylvania (eastern)	50 (+14)	18 (+5)		79 (+19)	80 (+44)	74 (+16)
Maryland	33 (−3)	7 (−6)	0 (−43)	79 (+19)	57 (+21)	67 (+9)
Virginia (eastern)	8 (−28)	6 (−7)	60 (+17)	53 (−7)	33 (−3)	52 (−6)
Florida (middle)	50 (+14)	0 (−13)	40 (−3)	47 (−13)	28 (−8)	45 (−13)
Texas (northern)	0 (−36)	4 (−9)	25 (−18)	51 (−9)	24 (−12)	41 (−17)
Kentucky (eastern)	50 (+14)	0 (−13)	0 (−43)	11 (−49)	8 (−28)	17 (−41)
Ohio (northern)	43 (+7)	10 (−3)	50 (+7)	67 (+7)	45 (+9)	68 (+10)
Illinois (northern)	43 (+7)	16 (+3)	0 (−43)	64 (+4)	50 (+14)	62 (+4)
Indiana (southern) [1]						
Missouri (eastern)	60 (+24)	7 (−6)	0 (−43)	51 (−9)	14 (−22)	58 (0)
Missouri (western)	0 (−36)	6 (−7)	100 (+57)	78 (+18)	47 (+11)	74 (+16)
California (northern)	29 (−7)	12 (−1)	50 (+7)	65 (+5)	25 (−9)	62 (+4)
California (central)	53 (+17)	21 (+8)	50 (+7)	75 (+15)	64 (+28)	79 (+21)
Kansas	10 (−26)	19 (+6)	100 (+57)	61 (+1)	35 (−1)	64 (+6)
OOklahoma (western)	18 (−18)	25 (+12)	0 (−43)	49 (−11)	21 (−15)	42 (−16)
District of Columbia	37 (+1)	16 (+3)	35 (−8)	49 (−11)	48 (+12)	54 (−4)

[1] No information was available for the southern district of Indiana.

Source: Administrative Office of the U.S. Courts, "Federal Offenders in U.S. District Courts, 1972," app. table X–4.

It has been suggested by some, as noted before, that the Parole Commission retain its assumed role of correcting sentencing disparities. The Parole Commission cannot correct the disparities in decisions as to the kind of sentence that should be imposed, however, and for this and several other more fundamental reasons that have been discussed in relation to the new subchapters A and D of chapter 227 of title 18, the Committee has not retained the Parole Commission. The Committee believes that the sentence provisions as a whole provide ample safeguards against unwarranted disparity without a requirement that the Parole Commission review the product of a series of decisions made by the Sentencing Commission, the Congress, the sentencing judge, and perhaps an appellate court. Indeed, retention of this function by the Parole Commission would undercut the sentencing guidelines before they are even put in place. For example, if there were parole eligibility for half a prison term, the Sentencing Commission probably would not know whether to issue guidelines that recommended prison terms that were twice as long as the Commission thought should be served or terms that reflected actual time to be served. If, despite the guidelines, the Parole Commission were to retain the power to release prisoners after a fixed eligibility period, it is likely that the sentencing judges would try to second-guess both the guidelines and the Parole Commission and, in fixing a defendant's sentence, try to determine when the offender actually would be released. It is hard to conceive of a step that would be more damaging to the entire sentencing system found in the reported bill.[390]

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[389] P. O'Donnell, M. Churgin, and D. Curtis, *Toward a Just and Effective Sentencing System* 5–6, Tables 1 and 2 (1977).

Subsection (a)(1)(B) requires that the sentencing guidelines recommend an appropriate amount of fine or appropriate length of a term of probation or imprisonment. In recommending an appropriate fine, the Commission could, of course, provide a formula or set of principles for determining an appropriate fine relative to the damage caused, the gain to the defendant, or the ability of the defendant to pay, consistent with the flexibility possible because of the high maximum fines set forth in proposed subchapter C of chapter 227 of title 18, United States Code, rather than specifying a dollar amount of fine.

Subsection (a)(1)(C) requires that the sentencing guidelines recommend whether a category of defendant convicted of a particular offense who is sentenced to a term of imprisonment should be required to serve a term of supervised release, and, if so, what length of term is appropriate.

The Committee added a new subsection (a)(1)(D) in S. 1630 in the 97th Congress that requires that the sentencing guidelines include recommendations as to whether sentences to terms of imprisonment should be ordered to run concurrently or consecutively. The Committee has taken this approach instead of the approach in earlier versions of the bill that set, in section 3584 of title 18, a ceiling on the maximum term of imprisonment that could be imposed for multiple offenses. The Committee believes that the new provision when read with the revised version of 28 U.S.C. 994(*l*) will lead to carefully considered determinations as to the appropriateness of concurrent, consecutive, or overlapping sentences in cases of multiple offenses.

The list of determinations concerning which the guidelines should make recommendations is not necessarily inclusive. For example, the Sentencing Commission may wish to make recommendations in the guidelines in some cases as to, for example, a requirement of restitution or a particularly appropriate condition of probation for a category of offender convicted of a particular offense.

Under subsection (a)(2), the Commission is required to issue general policy statements concerning application of the guidelines and other aspects of sentencing and sentence implementation that would further the ability of the Federal criminal justice system to achieve the purposes of sentencing set forth in section 101(b) of title 18. The policy statements are required to address the questions of the appropriate use of: the sanctions of order of criminal forfeiture,[391] order of restitution,[392] and order of notice to victims,[393] conditions of probation,[394] and supervised release,[395] sentence modification provisions for fines,[396] probation,[397] and imprisonment,[398] authority under Rule 11(e) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement; and temporary release under proposed section 3622 of title 18 and prerelease custody under proposed section 3624(c) of title 18. These policy statements could also address, for example, such questions as the appropriateness of sentences outside the guidelines where there exists a particular aggravating or mitigating factor which does not occur sufficiently frequently to be incorporated in the guidelines themselves, and could describe factors that the Sentencing Commission found should *not* affect a sentence. The policy statements might also address such issues as the kind of recommendations a judge might make pursuant to proposed section 3582(a) of title 18 to the Bureau of Prisons as to an appropriate prison facility for a defendant committed to its custody. Another important function of the policy statements might be to alert Federal district judges to existing disparities which are not adequately cured by the guidelines, while offering recommendations as to how such situations should be treated in the future.

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[390] See, e.g., Subcommittee Criminal Code Hearings, Part XIII, at 8579, 8595, 9021 (testimony of former Judge Harold Tyler before the House Judiciary Subcommittee on Criminal Justice, October 11, 1979); letter from Judge Jon O. Newman, United States Court of Appeals for the Second Circuit, to Congressman Robert F. Drinan, Chairman, House Judiciary Subcommittee on Criminal Justice, dated September 14, 1979; letter to the Editor, The New York Times, November 15, 1979, from Marvin E. Frankel, Norval Morris, and Alan Dershowitz. See also Kennedy, *Toward a New System of Criminal Sentencing: Law With Order*, 16 Am. Crim. L. Rev. 353, 377 (1979).

[391] Proposed 18 U.S.C. 3554.

[392] Proposed 18 U.S.C. 3556.

Another area in which the Sentencing Commission might wish to issue general policy statements concerns the imposition of sentence upon organizations convicted of criminal offenses. Under proposed section 3551(c), such an organization may be sentenced to probation pursuant to proposed subchapter B of chapter 227, to pay a fine pursuant to proposed subchapter C of chapter 227, to forfeit property pursuant to proposed 18 U.S.C. 3554, to give notice to victims pursuant to proposed 18 U.S.C. 3555, to make restitution pursuant to proposed 18 U.S.C. 3556, or to any combination of such penalties that the sentencing judge deems fitting under the circumstances. Given the breadth of discretion thus available to the court in the context of sentencing an organizational defendant, the Committee believes that it would be appropriate for the Sentencing Commission, by means of policy statements, to provide guidance to sentencing judges concerning such matters as: (1) considerations relevant to the coordination of criminal sanctions imposed with any civil remedies that may be available under the circumstances; (2) considerations relevant to the imposition of sanctions involving forfeiture, notice to victims, and restitution; and (3) considerations relevant to the selection of conditions of probation involving such judicial monitoring of the activities of a convicted organization as may be appropriate under the circumstances of the case.[399]

Under subsection (a)(3), the Sentencing Commission is required to issue either guidelines or policy statements concerning the appropriate use of probation revocation under proposed 18 U.S.C. 3565, and of the provisions for modification of the term or conditions of probation or supervised release under proposed 18 U.S.C. 3563(c), 3564(d), and 3583(e).

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[393] Proposed 18 U.S.C. 3555.

[394] Proposed 18 U.S.C. 3563.

[395] Proposed 18 U.S.C. 3583 (d) and 3563.

[396] Proposed 18 U.S.C. 3573.

[397] Proposed 18 U.S.C. 3563(c).

[398] Proposed 18 U.S.C. 3582(c).

[399] See, for example, American Bar Association recommendations, Criminal Code Hearings, Part XVI, at 11855–58, 11877–78, 12354–56.

The provision of subsection (a)(2)(D), concerning the issuance of policy statements with regard to plea acceptance, is especially important. The guideline sentencing provisions of S. 1437 in the 95th Congress were criticized on the ground that, while structuring and rationalizing the exercise of judicial sentencing discretion, they did not also address the exercise of prosecutorial discretion at the charging and plea agreement stages of criminal proceedings. As a result of this omission, it was claimed, prosecutorial decisions—particularly decisions to reduce charges in exchange for guilty pleas—could effectively determine the range of sentence to be imposed, and could well reduce the benefits otherwise to be expected from the bill's guideline sentencing system.

One approach that has been suggested for dealing with this situation is to have sentencing judges review charge-reduction plea agreements to ensure that such agreements do not result in undue leniency or unwarranted sentencing disparities.[400] Subsection (a)(2)(D), in combination with the bill's modification of Rule 11(e) of the Federal Rules of Criminal Procedure (to clarify that the Rule covers withholding of charges as well as dismissal of charges) and the addition of subsection (q) of section 994 (to require careful attention by the Sentencing Commission to the effects of plea agreements on sentencing under the new act), is intended to implement this suggestion. It would require the Sentencing Commission to promulgate policy statements for use by a sentencing court in determining whether, pursuant to Rule 11(e)(2), to accept a charge-reduction agreement described in Rule 11(e)(1). This approach is intended to provide an opportunity for meaningful judicial review of proposed charge-reduction plea agreement, as well as other forms of plea agreements, while at the same time to guard against improper judicial intrusion upon the responsibilities of the Executive Branch.

It should be noted that a sentence that is inconsistent with the sentencing guidelines is subject to appellate review,[401] while one that is consistent with guidelines but inconsistent with the policy statements is not. This is not intended to undermine the value of the policy statements. It is, instead, a recognition that the policy statements may be more general in nature than the guidelines and thus more difficult to use in determining the right to appellate review. Nevertheless, the sentencing judge is required to take the policy statements into account in deciding what sentence to impose [402] and it is expected that the policy statements will be consulted at all stages of the criminal justice system, including the appellate courts, in evaluating the appropriateness of the sentence and corrections program applied to a particular case.

Under subsection (b), the Commission is to devise categories based on characteristics of the offense and categories based on characteristics of the offender.[403] For each combination of a category of offense and a category of offender, a sentence or sentencing range is to be recommended that is consistent with all pertinent provisions of title 18 of the United States Code.

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[400] See S. Schulhofer, *Prosecutorial Discretion and Federal Sentencing Reform*, Report for Federal Judicial Center (August 1979).

[401] See proposed 18 U.S.C. 3742.

[402] See proposed 18 U.S.C. 3553(a)(5).

[403] Subsections (c) and (d) suggest factors that the Commission might conclude are pertinent to the sentencing decision.

This subsection is of major significance. It contemplates a detailed set of sentencing guidelines, to be used as indicated in subsection (a) and proposed subchapters A through D of chapter 227 of title 18, that are designed to achieve the purposes of sentencing set forth in title 18. The Committee expects that there will be numerous guideline ranges, each range describing a somewhat different combination of offender characteristics and offense circumstances. There would be expected to be, for example, several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances.[404] The guidelines may be designed and promulgated for use in the form of a series of grids, charts, formulas, or other appropriate devices, or perhaps a combination of such devices. Whatever their form, the general logic underlying the effects of individual factors would presumably be apparent, or at least would be traceable to Sentencing Commission determinations. The result should be a complete set of guidelines that covers in one manner or another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results.[405] Whether the Sentencing Commission concludes that it should promulgate, for example, a separate guidelines matrix for each statute describing an offense, or one guidelines matrix for property offenses and another for offenses against the person, the result will be sets of guidelines considerably more detailed than the existing parole guidelines.

The subsection requires that, if the guidelines recommend a term of imprisonment for a particular category of offense committed by a particular category of offender, the maximum of the sentencing range recommended may not exceed the minimum of that range by more than 25 percent. For a particular penal offense, therefore, while there might be numerous guideline ranges, each keyed to one or more variations in relevant factors, no one particular guideline range may vary by more than 25 percent from its minimum to its maximum; all the ranges together, however, would be expected to cover the spectrum from no, or little, imprisonment to the statutory maximum, or close to it, for the applicable class of offense. The breadth of the sentencing range provided in each guideline is a matter for the Commission to decide so long as it is within the 25-percent limit specified in subsection (b). The range may be narrow where the purposes of sentencing can be served by a single sentence or a narrow range of sentences in all similar cases. The range may necessarily be broader where miscellaneous factors not entirely provided for in the guidelines may change the appropriate sentence in a particular case. A range may also be broad where no such factors exist, but where the Commission is not sufficiently confident in its judgment as to the appropriate sentence to suggest a narrow range. For this group of cases, the guideline range might well become more narrow as, over time, the Commission is able to refine its guidelines.

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[404] For example, it is possible in some cases that the sentencing recommendation for a particular type of case will vary as to length or type of sentence because different purposes of sentencing apply to different categories of offenders convicted of basically similar offenses.

[405] In developing the form in which the guidelines are to be used, the Committee expects that the Commission will undertake an evaluation to assure that the guidelines are not so complex as to detract from their effective use.

The Commission is free to include in the guidelines any matters it considers pertinent to satisfy the purposes of sentencing. The Committee is aware that guidelines addressing this broad range of sentencing alternatives—rather than just the length of terms of imprisonment, for example, covered by the current Parole Commission guidelines—will be difficult to develop. That is true especially in view of the 25-percent limitation on the difference between the maximum and minimum terms of imprisonment specified in a single guideline range. The Committee expects the Commission to issue guidelines sufficiently detailed and refined to reflect every important factor relevant to sentencing for each category of offense and each category of offender, give appropriate weight to each factor, and deal with various combinations of factors. By so doing, the Commission will be able to maintain the proper relationship between its function and that of the courts of appeals in contributing to purposeful and consistent sentencing. It is for these reasons, among others, that the Commission is to be created 24 months before the guidelines are to be put into use, and that the Commission will have full-time members and an extensive research capability.

Subsection (c) lists a number of offense characteristics that the Sentencing Commission is required to examine for the purpose of determining whether and to what extent they are pertinent to the establishment of categories of offenses for use in the sentencing guidelines and policy statements dealing with the nature, extent, place of service, or other incidents of an appropriate sentence. The Commission is required to determine whether and to what extent each factor might be pertinent to the question of the kind of sentence that should be imposed; the size of a fine or the length of a term of probation, imprisonment, or supervised release; and the conditions of probation, supervised release, or imprisonment. The Sentencing Commission may conclude, with respect to any of the listed factors, that, for example, the factor should not play a role at all in sentencing for a particular purpose. The Sentencing Commission is also required under subsection (c) to determine whether other factors not specifically listed are relevant to the sentencing decision.

Subsection (c)(1) specifies that the Commission consider the degree of relevance of the grade of the offense to the sentencing decision. As discussed in connection with proposed section 3581 of title 18, all offenses are graded according to their relative seriousness. This does not mean that the Committee intends that offenses with the same grade necessarily have the same sentence.[406] It is intended instead that the grading be some guide as to the Congress view of the relative seriousness of similar offenses. The rough approximations practical for statutory purposes are expected by the

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[406] This is especially true since the bill does not attempt to regrade current law offenses according to their relative seriousness, but leaves consideration of these issues to a later day.

Committee to be refined considerably by the sentencing guidelines.[407]

Subsection (c)(2) specifies that the Commission consider the relevance to the sentencing decision of the circumstances under which the offense was committed that might aggravate or mitigate the seriousness of the offense. Among the considerations the Commission might examine under this factor are whether the offense was particularly heinous; whether the offense was committed on the spur of the moment or after substantial planning; whether the offense was committed in reckless disregard of the safety of others; whether the offense involved a threat with a weapon or use of a weapon; whether the offense was committed in a manner plainly designed to limit the danger to the victims; whether the defendant was acting under a form of duress not rising to the level of a defense; etc.

Subsection (c)(3) specifies that the Commission consider the relevance to the sentencing decision of the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust. The Commission might include in this consideration, or in policy statements, an evaluation of the role that unusual vulnerability of the victim that is known to the defendant should play in the sentencing decision.

Subsection (c)(4) specifies that the Commission consider the relevance of the community[408] view of the gravity of the offense to the sentencing decision, and subsection (c)(5) specifies consideration of the public concern generated by an offense. These suggestions are not intended to mean that a sentence might be enhanced because of public outcry about a single offense. It is intended, instead, to suggest that changed community norms concerning particular criminal behavior might be justification for increasing or decreasing the recommended penalties for the offense. Two recent examples of action by the Parole Commission with regard to its guidelines suggest the kinds of situations in which the Commission might wish to reflect the community view of an offense in its guidelines: the Parole Commission has in recent years lowered the guidelines parole dates applicable to simple possession of marihuana, and, following the Vietnam War, lowered the guidelines parole dates for draft violations. Similarly, if there were a substantial increase in the rate of commission of a very serious crime, the public concern generated by that increase might cause the Commission to conclude that the guidelines sentences for the offense should be increased.

Subsection (c)(6) specifies that the Commission consider the relevance to the sentencing decision of the deterrent effect a particular sentence may have on the commission of the offense by others. Thus, the Commission might conclude, for example, that there was an increase in the incidence of a particular offense that justified an increase in the guidelines sentences for the offense in order to deter others from committing the offense. The Commission might also conclude, on the basis of further research, that some kinds of offenses may be more easily deterred than others, and that this might appropriately be reflected in the guidelines.

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[407] The Committee hopes that the process of developing the guidelines will lead to recommendations by the Sentencing Commission as to appropriate grades for the offenses contained in federal law.

[408] The community might be national or it might be regional. It is expected that, while nationwide consistency in sentences in Federal cases is generally desirable, in certain situations the Commission may find it appropriate to draft the guidelines to take account of considerations based on pertinent regional differences.

Subsection (c)(7) specifies that the Commission consider the relevance to the sentencing decision of the current incidence of the offense in the community and in the Nation as a whole.

Subsection (d) lists a number of offender characteristics that the Sentencing Commission is required to examine in order to determine whether and to what extent they are pertinent to the establishment of categories of offenders for use in the sentencing guidelines and policy statements concerning the nature, extent, place of service, or other incidents of an appropriate sentence. The Commission is required to determine whether and to what extent each factor might be pertinent to the question of the kind of sentence that should be imposed; the size of a fine or the length of a term of probation, imprisonment, or supervised release; and the conditions of probation, supervised release, or imprisonment. The Sentencing Commission may conclude, with respect to any of the listed factors, that, for example, the factor should not play a role at all in sentencing for a particular purpose, or that, for example, it is relevant to the type of prison facility to which a defendant is sent if he is sentenced to a term of imprisonment, but is not relevant to the question whether he should be sentenced to a term of imprisonment, probation, or a fine. The Sentencing Commission is also required under subsection (d) to determine whether other factors not specifically listed are relevant to the sentencing decision.

Subsection (d) contains a specific provision that "The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socio-economic status of offenders.[409] The Committee added the provision to make it absolutely clear that it was not the purpose of the list of offender characteristics set forth in subsection (d) to suggest in any way that the Committee believed that it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training.[410]

Subsection (d)(1) specifies that the Commission consider what effect the age of the defendant should have on the sentencing decision. The factor derives in part from the fact that, under the Youth Corrections Act and the young adult offender provisions in current law, the youth of an offender frequently plays a role in the sentencing decision. This role may, depending upon the way in which the current law provisions are applied, result in a more harsh or less harsh sentence than a regular adult offender would receive for the same offense committed under similar circumstances. The sentence might be more harsh today if the defendant is sentenced to an indeterminate sentence under 18 U.S.C. 5010(b) for a relatively minor offense. Under 18 U.S.C. 5017(c), such a defendant is required to be released upon parole in no more than four years, and to be unconditionally released in six years, yet this sentence could apply to an offense for which an adult might be sentenced, for example, to only one or two years in prison. Conversely, if the young offender is sentenced for a more serious offense under the Youth Corrections Act provisions that permit the imposition of a sentence up to that applicable for the same offense if committed by an adult, he may actually serve less time in prison than his adult counterpart—the parole guidelines that apply to persons sentenced under the Youth Corrections Act for all but the least serious offenses provide earlier parole release dates than for an adult convicted of an offense with the same severity rating who has the same "parole prognosis" or "salient factor" score. An additional problem with the Youth Corrections Act is that judges are inconsistent in their use of the sentencing provisions of the Act. For example, some judges use the Act's sentencing provisions for most youthful offenders, while others will not use it for those involved in serious felonies. The Committee believes that, while consideration of youth in determining the appropriate sentence may be justified, the consideration should be employed in a much more rational and consistent way than it is today. Accordingly, the bill repeals the Youth Corrections Act and the young adult offender sentencing provisions and requires the Sentencing Commission in subsection (d)(1) to consider, in promulgating the sentencing guidelines and policy statements, what effect age—including youth, adulthood, and old age—should have on the "nature, extent, place of service, or other incidents of an appropriate sentence."

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[409] The requirement of neutrality with regard to such factors is not a requirement of blindness. In sentencing a person to imprisonment it would be appropriate to have a judge consider, for example, recommending placement in an institution equipped to accommodate the religious dietary laws followed by the defendant, or an institution housing prisoners of the defendant's sex.

[410] Indeed, in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, the Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training. This qualifying language in subsection (d), when read with the provisions in proposed section 3582(a) of title 18 and 28 U.S.C. 994(k), which precludes the imposition of a term of imprisonment for the sole purpose of rehabilitation, makes clear that a defendant should not be sent to prison only because the prison has a program that "might be good for him."

Subsection (d)(2) specifies that the Commission determine what effect, if any, the education of the offender should have on the nature, extent, place of service, or other incidents of an appropriate sentence. Subsection (e) specifies that education should be an inappropriate consideration in determining to sentence a defendant to a term of imprisonment or in determining the appropriate length of such a term. The Commission might conclude, however, that the need for an educational program might call for a sentence to probation if such a sentence were otherwise adequate to meet the purposes of sentencing, even in a case in which the guidelines might otherwise call for a short term of imprisonment. Clearly, education considerations will play an important role in such determinations as the conditions of probation or supervised release, the nature of the prison facility to which an offender is sent, and the type of programs to be made available to an offender in prison.[411]

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[411] A defendant's education or vocation would, of course, be highly pertinent in determining the nature of community service he might be ordered to perform as a condition of probation or supervised release.

Subsection (d)(3) specifies that the Commission determine the effect, if any, that the vocational skills of the offender should have on the incidents of the sentence. The considerations for the Commission, including the restrictions of subsection (e), are similar to those for the education factor.

Subsection (d)(4) specifies that the Commission shall determine what effect, if any, the defendant's "mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant" should have on the attributes of the sentence. The Commission might conclude that a particular set of offense and offender characteristics called for probation with a condition of psychiatric treatment, rather than imprisonment. Consideration of this factor might also lead the Commission to conclude, in a particularly serious type of case, that there was no alternative for the protection of the public but to incarcerate the offender and provide needed treatment in a prison setting.

Subsection (d)(5) requires consideration of the defendant's physical condition, including drug dependence. Drug dependence, in the Committee's view, generally should not play a role in the decision whether or not to incarcerate the offender. In an unusual case, however, it might cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison, for "drying out," as a condition of probation. Other health problems of the defendant might cause the Commission to conclude that in certain circumstances involving a particularly serious illness a defendant who might otherwise be sentenced to prison should be placed on probation. This is consistent with the provision of proposed section 3582(c) permitting the Director of the Bureau of Prisons to petition the court for reduction of a term of imprisonment in a compelling case, such as terminal cancer. Of course, the physical condition of the defendant would play an appropriate role in the determination of the conditions of probation and the programs that would be made available to the defendant in prison, such as drug or alcohol treatment programs. It should be noted that drug treatment programs at the present time are made available to prisoners on a voluntary basis, but are not required since prison officials have yet found no way to make compulsory programs effective.

Subsection (d)(6) specifies that the Commission should consider the relevance of the defendant's employment record to the attributes of sentence. The considerations here, including the provisions of subsection (e), are similar to those for the education and vocational skill of the defendant.

Subsection (d)(7) specifies that the Commission consider the extent to which family ties and responsibilities are pertinent to the sentencing decision. As stated in subsection (e), the Committee believes that the factor is generally inappropriate in determining to sentence a defendant to a term of imprisonment or in determining the length of a term of imprisonment. The Commission certainly could conclude, however, that, for example, a person whose offense was not extremely serious but who should be sentenced to prison should be allowed to work during the day, while spending evenings and weekends in prison, in order to be able to continue to support his family. Even more frequently, perhaps, family ties might play a role in such matters as the location of the prison facility in which a prisoner is to be housed, the use of furlough, and the location of pre-release custody.

Subsection (d)(8) specifies that the Commission consider the extent to which community ties are pertinent to the sentencing decision. Under subsection (e), the Committee again has found that this factor is generally inappropriate in determining to sentence a defendant to a term of imprisonment or in determining the appropriate length of a term of imprisonment. Like family ties and responsibilities, this factor could play a role in determining in which prison facility a defendant might be incarcerated.

Subsection (d)(9) specifies that the Commission is to consider the extent to which the defendant's role in the offense should affect the sentencing decision. This factor includes such matters as whether the defendant initiated the offense or followed someone else's lead, or whether the defendant was a major participant or acted only in a minor capacity. The Commission might reasonably conclude that the answers are important in determining both the nature of the sentence and its length and conditions.

Subsection (d)(10) specifies that the Commission consider the extent to which the defendant's criminal history should affect his sentence. This factor includes not only the number of prior criminal acts—whether or not they resulted in convictions—the defendant has engaged in, but their seriousness, their recentness or remoteness, and their indication whether the defendant is a "career criminal" or a manager of a criminal enterprise.

Subsection (d)(11) specifies that the Commission consider the relevance to the sentencing decision of the degree of the defendant's dependence on criminal activity for a livelihood.

Subsections (e) through (m) of section 994 contain general statements of legislative direction for the Commission to follow in promulgating guidelines.

Subsection (e) specifically requires that the Sentencing Commission insure that the sentencing guidelines and policy statements reflect the "general inappropriateness" of considering education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant in recommending a term of imprisonment or the length of a term of imprisonment. As discussed in connection with subsection (d), each of these factors may play other roles in the sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment, if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community.

The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties. It should be emphasized, however, that the Committee decided to describe these factors as "generally inappropriate," rather than always inappropriate, to the decision to impose a term of imprisonment or determine its length, in order to permit the Sentencing Commission to evaluate their relevance, and to give them application in particular situations found to warrant their consideration. The Committee believes that it is important to encourage the Sentencing Commission to explore the relevancy to the purposes of sentencing of all kinds of factors, whether they are obviously pertinent or not; to subject those factors to intelligent and dispassionate professional analysis; and on this basis to recommend, with supporting reasons, the fairest and most effective guidelines it can devise. There are sufficient checks built into the system to avoid aberrations, and thus the guidance in this subsection is cautionary rather than proscriptive.

Subsection (f) directs that the Commission, in promulgating sentencing guidelines, promote the purposes of the guidelines, particularly the avoidance of unwarranted sentencing disparity.[412]

Subsection (g) directs the Commission, in promulgating sentencing guidelines pursuant to subsection (a)(1), to seek to satisfy the purposes of sentencing, taking into account the nature and capacity of the penal, correctional, and other facilities and services available. The purpose of the requirement is to assure the most appropriate use of the facilities and services to carry out the purposes of sentencing, and to assure that the available capacity of the facilities and services is kept in mind when the guidelines are promulgated. It is not intended, however, to limit the Sentencing Commission in recommending guidelines that it believes will best serve the purposes of sentencing. Instead, it is intended that the Commission be aware of the system's capacity in order to assure that it is not inadvertently exceeded, and that the Commission make recommendations as to any changes in that capacity that it believes to be necessary in light of its sentencing guidelines.

Subsection (h) was added to the bill in the 98th Congress to replace a provision proposed by Senator Kennedy enacted in S. 2572, as part of proposed 18 U.S.C. 3581, that would have mandated a sentencing judge to impose a sentence at or near the statutory maximum for repeat violent offenders and repeat drug offenders. The Committee believes that such a directive to the Sentencing Commission will be more effective; the guidelines development process can assure consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.

Subsection (i) requires that the sentencing guidelines provide a substantial term of imprisonment for a convicted defendant who fits into one of five categories: a defendant who has a history of prior Federal, State, or local felony convictions for offenses committed on different occasions; a defendant who has committed the offense as part of a pattern of criminal activity from which he derived a substantial portion of his income; a defendant who committed the offense in furtherance of a conspiracy with three or more persons engaging in racketeering activity in which the defendant played a managerial role; a defendant who committed a violent felony while on pretrial release or release while awaiting sentence or appeal for another felony; or a defendant who committed an offense described in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), if the offense involved a substantial quantity of controlled substances. The first three categories are derived from the dangerous special offender sentencing provisions now contained in 18 U.S.C. 3575(e) and the dangerous special drug offender provisions of 21 U.S.C. 849(e). However, rather than providing enhanced sentences above the maximum sentence provided for any other similar offense, as is done in current 18 U.S.C. 3575(b), section 994(i) requires that the guidelines insure a substantial sentence to imprisonment that is nevertheless within the range generally available for the offense. The fourth category was added on the Senate Floor as an amendment to S. 1437 in the 95th Congress. The fifth category was added to S. 1630, as introduced, in order to assure a substantial term of imprisonment for major drug traffickers. It should be noted that subsections (h) and (i) are not necessarily intended to be an exhaustive list of types of cases in which the guidelines should specify a substantial term of imprisonment, nor of types of cases in which terms at or close to authorized maxima should be specified.

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[412] The parole guidelines were a pioneering effort to bring uniformity to parole decisions, which they have been fairly successful in doing. They were developed, however, from past decisions. The sentencing guidelines will differ significantly in their substance and in their theoretical base. They will require reevaluation of all underlying policies.

Subsection (j) requires the Sentencing Commission to insure that the guidelines reflect the general appropriateness of a sentence other than imprisonment for a first offender whose offense is not a crime of violence or an otherwise serious offense,[413] and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

Subsection (k) makes clear that a sentence to a term of imprisonment for rehabilitative purposes is to be avoided. A term imposed for another purpose of sentencing may, however, have a rehabilitative focus if rehabilitation in such a case is an appropriate secondary purpose of the sentence.

Subsection (*l*) directs the Commission to promulgate guidelines that reflect the appropriateness of imposing an incremental penalty for each offense if a defendant is convicted of a number of offenses that are part of the same course of conduct, and if a defendant is convicted of multiple offenses committed at different times, including cases in which the subsequent offense is a violation of 18 U.S.C. 3146, relating to bail jumping, or is committed while the person is on pretrial release pursuant to section 3502 of title 18. If no such incremental penalty were provided (e.g., were all sentences to be imposed without regard to the commission of other offenses and made to run concurrently), an offender who commits one offense would be faced with no deterrent to the commission of another during the interval before he is called to account for the first.[414] It is the Committee's intent that, to the extent feasible, the sentences for each of the multiple offenses be determined separately and the degree to which they should overlap be specified. Under this approach, if the conviction for one of the offenses is overturned, it will be unnecessary to recalculate the sentence.

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[413] The similar provisions of S. 1437, as introduced in the 95th Congress, applied only to defendants under the age of twenty-six at the time of sentencing.

[414] See the discussion of proposed 18 U.S.C. 3584, *supra*.

Subsection (*l*) also requires that the guidelines reflect the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit or soliciting the commission of an offense and for an offense that was the sole object of the solicitation or conspiracy.

Subsection (m) requires that the Commission insure that the guidelines reflect that in many cases current sentences do not accurately reflect the seriousness of the offense. The Commission is directed, as a starting point, to ascertain the average sentence imposed for different categories of cases and the average length of time served in prison when such terms were imposed,[415] but the bill makes clear that the Commission need not follow the current average sentences if it finds that they do not adequately reflect the purposes of sentencing set forth in proposed 18 U.S.C. 3553(a)(2). It is not intended that the Sentencing Commission necessarily continue to follow the average sentencing practices of the past. It is intended that the Commission learn what those practices were in order more effectively to evaluate the appropriateness of continuing or changing past practices.[416] The Commission might conclude that a category of offenders, for example, first offenders convicted of a particular nonviolent offense that did not involve substantial harm to the victim, were too frequently sentenced to terms of imprisonment, and that for many of them a term of probation might sufficiently carry out the punishment, deterrence, incapacitation, and rehabilitation purposes necessary, particularly if a fine, restitution or community service substantial enough to reflect the seriousness of the offense were imposed as a condition. On the other hand, the Commission might conclude that a category of major white collar criminals too frequently was sentenced to probation or too short a term of imprisonment because judges using the old rehabilitation theory of sentencing, did not believe such offenders needed to be rehabilitated and, therefore, saw no need for incarceration. The Commission might conclude that such a category of offenders should serve a term of imprisonment, or a longer term than currently served, for purposes of punishment and deterrence. The Commission might also conclude that a particular category of violent crime or drug trafficking is not punished sufficiently severely today, and might reflect this conclusion in the guidelines. Finally, the Commission might conclude that there was insufficient data for a particular combination of offense and offender characteristics on which to base a policy decision on the appropriateness of the existing sentencing pattern. For example, the number of persons convicted of a particularly serious violent offense in the Federal system might not be large enough for the data on that category of offense to give an accurate picture of the sentencing practices for that offense, in which case the Sentencing Commission would have to exercise its best judgment as to what sentences would adequately reflect the purposes of sentencing.

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[415] With the elimination of early parole release it is absolutely essential that the Commission not be unduly influenced by the lengths of sentences of imprisonment imposed today. A Federal judge who today believes that an offender should serve four years in prison may impose a sentence in the vicinity of ten years, knowing that the offender is eligible for parole release after one-third of the sentence. The Commission should concern itself, instead, with the length of time convicted defendants actually spend in prison today—this length of time provides a considerably more accurate picture of actual sentencing practices than does the sentence imposed.

[416] See B. Forst, W. Rhodes, and C. Wellford, *Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines,* 7 Hofstra L. Rev. 355 (1979).

Subsection (n) requires the Commission continually to update its guidelines and to consult with a variety of interested institutions and groups. This revision and refinement of the guidelines will represent the bulk of the Commission's work once the initial guidelines and policy statements are promulgated. This task will be a formidable one because it includes a continuing effort to refine the guidelines to best achieve the purposes of sentencing. It requires continually updating the guidelines to reflect current views as to just punishment, and to take account of the most recent information on satisfying the purposes of deterrence, incapacitation, and rehabilitation. Perhaps most importantly, this provision mandates that the Commission constantly keep track of the implementation of the guidelines in order to determine whether sentencing disparity is effectively being dealt with. In a very substantial way, this subsection complements the appellate review section by providing effective oversight as to how well the guidelines are working. The oversight would not involve any role for the Commission in secondguessing individual judicial sentencing actions either at the trial or appellate level. Rather, it would involve an examination of the overall operation of the guidelines system to determine whether the guidelines are being effectively implemented and to revise them if for some reason they fail to achieve their purposes.

Even without advancements in our ability to increase the effectiveness of various corrections programs for criminal offenders, much can be done to have ongoing guidelines take fullest advantage of the capability we do have. For example, sound statistical studies on the effectiveness of certain sanctions or treatment programs can be used to increase or decrease use of those particular sentencing alternatives. Recognition of the dimensions of the task is reflected in the extensive powers given the Commission under proposed 28 U.S.C. 995, particularly as they relate to research.[417]

Subsection (o) requires that proposed amendments to the guidelines be reported, along with a report of the reasons for the recommended amendments, to the Congress at or after the beginning of a session of Congress but no later than the first of May, and provides that the amendments are to take effect 180 days after they have been reported to Congress unless the effective date is enlarged or the guidelines are disapproved or modified by an Act of Congress.

Subsection (p), one of the provisions inserted by the Committee at the suggestion of Senator Biden in the 96th Congress, requires the Sentencing Commission and the Bureau of Prisons to conduct a thorough analysis of the optimum utilization of resources to deal with the Federal prison population, and to report to the Congress on the results of that study. In conducting the study, the Commission and the Bureau are required to examine a variety of alternatives, including modernization of existing facilities; inmate classification, and periodic review of the classification, to place inmates in the least restrictive facility necessary to insure adequate security; and use of existing Federal facilities, such as those within military jurisdiction.

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[417] *Ibid.*

Subsection (q) requires the Commission to make recommendations to the Congress concerning raising or lowering grades for offenses, or otherwise modifying the maximum penalties for offenses. The first set of recommendations is to be made within three years of the date of enactment of the bill, with later recommendations to be made as advisable. The Committee believes that the Commission will be in a particularly good position to make such recommendations to the Congress. It will be able to make recommendations based on such considerations as, for example, the fact that, for a particular category of offenses, the Commission never found it advisable to recommend a term of imprisonment even close to the maximum for the grade of offense, suggesting that the offense was overgraded. It might also find for a particular offense that the guidelines could not recommend what the Commission felt was an appropriately high sentence because the offense was graded too low. It might also find at a later date a need for recommending increased fine levels because the fine levels set forth in section 3571 of title 18 had become too low because of inflation, or were too high or too low for particular categories of offenses.

Subsection (r) requires the Sentencing Commission to give "due consideration" to a request by a defendant for modification of the sentencing guidelines applied to his case. The defendant could request such modification only on the basis of changed circumstances that were unrelated to his individual case, such as changes in the community view of the gravity of the offense, or the deterrent effect particular sentences for the offense might have on the commission of the offense by others. The Commission is required to respond, to state reasons for any declination to make modifications, and to keep the Congress informed of such actions on an annual basis. The Committee included this provision in the Ninety-Sixth Congress in order to assure that the Commission is constantly alerted to the possible need for amendments to the guidelines. Of course, if the Commission accepts a defendant's recomendations for amendment, it would submit the proposed amendment, and a report of the reasons for it, to the Congress pursuant to subsection (o), and would be expected to make a copy of these materials available to the defendant.

Subsection (s) requires the Commission to describe the "extraordinary and compelling reasons" that would justify a reduction of a particularly long sentence imposed pursuant to proposed 18 U.S.C. 3582 (c)(1)(A). The subsection specifically states, consistent with the rejection by the Committee of the rehabilitation theory as the basis for determining the length of a term of imprisonment, that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason" for reducing the sentence.

Subsection (t) requires the Sentencing Commission, in reducing the recommended term of imprisonment for a particular category of offense, to specify by what amount, if any, the term of a prisoner serving a sentence outside the new guidelines range may be reduced. This specification would then be used by the court in assessing a prisoner's petition pursuant to proposed 18 U.S.C. 3582(c)(3). It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases. However, if there is a major downward adjustment in guidelines because of a change in the community view of the offense, the Commission may conclude that this adjustment should apply to persons already serving sentences.

Subsection (u) provides that the policy statements issued by the Sentencing Commission shall include a policy limiting consecutive terms for an offense involving violation of a general prohibition and an offense involving a specific prohibition contained within the general prohibition. The policy is intended to apply to those offenses which in effect are "lesser included offenses" in relation to other, more serious ones, but which for merely technical reasons do not quite come within the definition of a lesser included offense. The limitation need not be a complete prohibition (except when sentencing for both offenses would be barred by law); its extent is to be determined by the Commission.

Subsection (v) provides that the appropriate judge or officer[418] will supply the Sentencing Commission in each case with a written report of the sentence containing detailed information as to the various factors relevant to the sentence and other information found appropriate by the Commission.[419] This provision is necessary for the Sentencing Commission to be able to monitor the effectiveness of various sentencing policies and practices. The Commission is required to submit at least annually to the Congress an analysis of the reports submitted to it under this provision, together with any recommendations for legislation that the analysis indicates is warranted.

Subsection (w) makes the provisions of 5 U.S.C. 553, the provisions of the Administrative Procedure Act that relate to rulemaking, applicable to the promulgation of guidelines pursuant to section 994. This is an exception to the general inapplicability of the Administrative Procedure Act—including its requirement of publication in the Federal Register—to the judicial branch.[420]

This provision establishes minimum procedural requirements for outside consultation by the Commission. The Committee recognizes that, ordinarily, the Commission will observe more extensive procedures than those required by section 553, at an earlier stage in the process of guideline development, to acquaint itself fully on the issues involved in the promulgation of specific guidelines. Proposed 28 U.S.C. 995(a)(21) empowers the Commission to hold hearings and call witnesses in the fulfillment of its duties. Such procedures are particularly appropriate for use by the Commission in developing guidelines. The Commission should consider as broad a cross-section of views and consult as diverse a group of interested parties as possible during all stages of guideline development. In this context the notice-and-comment procedures of section 553 will serve as a checking mechanism to insure that all relevant views are evaluated by the Commission. As a result, the Committee does not intend that the informal rulemaking procedures of section 553 constitute the first and only means by which the Commission consults interested parties outside the Commission; rather, these procedures represent the final steps in the process. It is also not intended that the guidelines be subject to appellate review under chapter 7 of title 5. There is ample provision for review of the guidelines by the Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable.

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[418] E.g., magistrate, probation officer, or prison officials.

[419] See also proposed 28 U.S.C. 995(a)(8).

[420] See 5 U.S.C. 551.

SECTION 995. POWERS OF THE COMMISSION

Subsection (a) enumerates twenty-one specific powers of the Commission that may be exercised by majority vote of the members present and voting,[421] and provides, in paragraph (22) that the Commission may perform such other functions as are required to permit Federal courts to meet their sentencing responsibilities, as provided in section 3553(a) of title 18, United States Code, and to permit others involved in the Federal criminal justice system to meet their related responsibilities. The section reflects the broad responsibility imposed upon the Commission to assure that sentencing and the administration of sentences fulfill the purposes of sentencing enumerated in section 3553(a) of title 18.

The first eight paragraphs of subsection (a) contain general administrative powers necessary to carry out the functions of the Commission. Paragraph (1) provides that the Commission may establish general policies and promulgate necessary rules and regulations. The policies, rules, and regulations covered by this paragraph differ from the sentencing guidelines and policy statements required to be promulgated pursuant to section 994(a)—paragraph (1) relates to those provisions necessary for the internal administration of the Commission and such matters as establishing the procedures for the conduct of hearings and receipt of views on the guidelines and policy statements. Paragraph (2) provides that the Commission may appoint and fix the salary and duties of the Staff Director of the Commission, who will be paid at a rate not to exceed the highest rate applicable for grade 18 of the General Schedule. It is the intent of the Committee that the Staff Director be a highly qualified individual who is able efficiently to administer the staff of the Commission, including administration of its very important research functions. Paragraph (3) gives the full Commission the authority to deny, revise, or ratify budget requests of the Commission prepared under the direction of the Chairman of the Commission pursuant to section 993(b)(1). Paragraphs (4), (5), (6), and (7) contain provisions common to Federal commissions relating to procurement power, acquisition of property and services, and contract authority. Paragraph (8) permits the Commission to request information from Federal agencies and judicial officers required in the performance of its duties, and permits those agencies and officers to provide the requested information consistent with other provisions of law. This provision is designed to permit the Commission to obtain information necessary to its research concerning efficacy of sentencing practices and to the preparation of guidelines and policy statements relating to sentencing matters.

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[421] It is intended that the members of the Commission approve the broad outlines of various research-related projects and provide policy guidance to their conduct. The functions of the Commission set forth here could, of course, be delegated to a committee or staff personnel by vote of the Commission in those instances where the day-to-day details would be too cumbersome to manage by full Commission action. See subsection (b). This is in contrast to the promulgation of guidelines and policy statements pursuant to section 994, matters which cannot be delegated. See proposed 28 U.S.C. 995(b).

In addition to these general administrative provisions, section 995 gives the Commission a number of powers relating specifically to its role in monitoring the effectiveness of the sentencing practices and policies in the Federal criminal justice system.

Under subsection (a)(9), the Sentencing Commission has authority to monitor the performance of probation officers with respect to sentencing recommendations, including those relating to application of guidelines and policy statements. Under subsection (a)(10), the Commission is authorized to issue instructions to probation officers concerning the application of guidelines and policy statements of the Commission. Under proposed 28 U.S.C. 994(b), these functions are to be coordinated, to the extent practicable, with the related activities of the Administrative Office of the United States Courts and the Federal Judicial Center. The probation officers will be a crucial link in the effectiveness of both sentencing guidelines and policy statements. It is essential that in preparing presentence reports, as well as making recommendations concerning applicable guidelines and in notifying sentencing judges of pertinent policy statements of the Sentencing Commission, the probation officers have sufficient information from the Commission to be able to discharge these duties with reasonable consistency. In addition, the probation officers, as supervisors of probationers and persons on supervised release, will need an understanding of the guidelines and policy statements in order to assist them in carrying out those supervisory functions.

A number of additional provisions provide for extensive research and data collection and dissemination authority in the sentencing area.[422] These functions are essential to the ability of the Sentencing Commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing set forth in proposed 18 U.S.C. 3553(a)(2),[423] and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.[424] These functions are to be carried out in cooperation, to the extent practicable, with the Administrative Office of the United States Courts and the Federal Judicial Center.[425]

Under subsection (a)(17), the Sentencing Commission is authorized to conduct programs of instruction in sentencing techniques for persons connected with the sentencing process.[426] While the in-

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[422] Subsections (a)(12) through (a)(16).

[423] See proposed 28 U.S.C. 991(b)(2).

[424] See proposed 28 U.S.C. 991(b)(1)(C). See also proposed 28 U.S.C. 994(n).

[425] See proposed 28 U.S.C. 995(b).

[426] The Sentencing Commission may wish to include in these programs such persons as prosecutors and defense counsel, sentencing and appellate judges, and probation officers who need to

Continued

structional effort would probably be most extensive during the early period of implementing the initial guidelines and policy statements, it is expected that periodic instruction will continue to be necessary, partly to bring personnel up to date on changes in the guidelines and policy statements and on developments in the case law, and partly to instruct new personnel in the Federal criminal justice system. The programs could be run in cooperation with the Department of Justice if both believed this approach would be helpful.[427] The programs are expected to be run in cooperation, to the extent practicable, with the Administrative Office of the United States Courts and the Federal Judicial Center.[428]

Under subsection (a)(19), the Commisson is authorized to study the feasibility of developing guidelines for the disposition of juvenile delinquents. The Parole Commission now uses its Youth Corrections Act guidelines for juveniles; it is expected that the Sentencing Commission will make a similar recommendation for Federal judges.

Subsection (b) is a broad statement as to powers and duties similar to section 995(a)(22), and includes specific authority to delegate powers other than promulgation of general policy statements and guidelines for sentencing pursuant to section 994(a), the issuance of general policies and promulgation of rules and regulations pursuant to section 995(a)(1), and the decision as to the factors to be considered in establishment of categories of offenders and offenses pursuant to section 994(b). It also contains language that requires the Commission, with respect to coordinate its activities under subsections (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (a)(15), (a)(16), (a)(17), and (a)(18), to the extent practicable, to utilize existing resources of the Administrative Office of the United States Courts and the Federal Judicial Center in order to avoid unnecessary duplication.[429]

Subsection (c) requires Federal agencies to make services, equipment, personnel, facilities, and information available to the greatest practicable extent upon request of the Commission in the execution of its functions.

Subsection (d) provides that a simple majority of the membership then serving shall constitute a quorum for the conduct of business. Except for the promulgation of sentencing guidelines or policy statements, the Commission may exercise its powers and fulfill its duties by the vote of a simple majority of the members present. Section 994(a) requires that guidelines and policy statements be promulgated only by affirmative vote of at least four members of the Commission. The phrase in subsection (d), "the membership then serving," means those members who have been appointed by the President and confirmed by the Senate. For example, if only five have been appointed at a given time, then only three are

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understand the Commission's guidelines and policy statements in order to assure their understanding of the new sentencing policies and procedures. In addition, prison officials would benefit from such instruction if they are involved in making sentencing recommendations and carrying out sentences pursuant to the guidelines and policy statements.

[427] See subsections (a)(11) and (b).

[428] See proposed 28 U.S.C. 995(b).

[429] Criminal Code Hearings, Part XVI, at 11918 (testimony of Judge Gerald Tjoflat).

needed for a quorum, and the Commission may conduct most routine business by the vote of two.

Subsection (e) requires the Commission, except where otherwise provided by law, to make available for public inspection a record of the final vote of each member on any actions taken.

SECTION 996. DIRECTOR AND STAFF

The Staff Director is given authority, under subsection (a), to supervise the activities of the Commission employees and perform other duties assigned by the Commission, and, under subsection (b), to appoint such officers or employees as are necessary in the execution of the functions of the Commission, subject to the approval of the Commission. The Committee intends that the Commission staff consist of persons with a wide variety of backgrounds pertinent to conducting criminal justice research and making recommendations as to sentencing policy.

The officers and employees of the Commission are, under subsection (b), exempted from most Civil Service provisions in title 5, United States Code, except for the benefits provided in chapters 81-89.

SECTION 997. ANNUAL REPORT

This section requires the Commission to report annually to the Judicial Conference, the Congress, and the President on the activities of the Commission.

SECTION 998. DEFINITIONS

This section defines the terms "Commission," "Commissioner," "guidelines," and "rules and regulations."

REPEALERS

Section 8(a) of the bill repeals a number of provisions of title 18 of the United States Code.

Section 1 of title 18, which defines felonies, misdemeanors, and petty offenses, is deleted as covered in the sentencing provisions of proposed chapter 227 of title 18.

Section 3012, relating to orders respecting persons in custody, is repealed as replaced by this title.

Sections 4082(a), 4082(b), 4082(c), 4082(e), 4084, and 4085, relating to commitment and transfer, are repealed as replaced by this title.

Chapter 309, relating to good time allowances and release dates, is repealed as covered by the release provisions of proposed 18 U.S.C. 3624.

Chapter 311, relating to parole, is repealed as replaced by the new sentencing provisions.

Chapter 314, relating to sentencing of narcotic addicts, is repealed consistent with the decision to repeal specialized sentencing provisions and replace them with provisions for sentencing guidelines that permit consideration of all combinations of offense and offender characteristics in a systematic manner.

Sections 4281, 4283, and 4284, relating to discharge and release payments, are deleted as covered by provisions of proposed chapter 229 of title 18.

Chapter 402, the Federal Youth Corrections Act, is repealed as covered by the sentencing guidelines provisions, particularly proposed 28 U.S.C. 994(d)(1). See the discussion of that provision.

Sections 8 (b) through (e) contain technical amendments to various analyses contained in title 18 to reflect the repeal of certain sections and chapters.

Section 9(a) repeals sections 404(b) and 409 of the Controlled Substances Act (21 U.S.C. 844(b) and 849), the specialized sentencing provisions for special dangerous drug offenders. These special dangerous offender provisions are more adequately covered in the sentencing guidelines provisions that require the guidelines to reflect a substantial term of imprisonment for drug traffickers. Section 9(b) makes a technical correction.

TECHNICAL AND CONFORMING AMENDMENTS

Section 10(a) amends section 212(a)(9) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(9)) to reflect the deletion of the concept of petty offense.

Section 10(b) amends section 242(h) of the Immigration and Nationality Act (8 U.S.C. 1252(h)) to add a reference to a term of supervised release after a reference to a parole term.

Section 11 amends section 4 of the Act of September 28, 1962 (16 U.S.C. 460k-3) to replace a reference to petty offenses with a reference to misdemeanors.

Section 12 amends section 9 of the act of October 8, 1944, to reflect the authority of the United States Magistrate to try and sentence persons charged with the commission of misdemeanors and infractions, as defined in proposed 18 U.S.C. 3581.

Section 13(a) amends section 924(a) of title 18 to delete a reference to parole, since parole is abolished.

Section 13(b) amends section 1161 of title 18 to update a cross-reference.

Section 13(c) amends section 1761(a) of title 18 to make an exception to the restriction on transportation or importation of prison-made goods applicable to a person on supervised release as well as to one on parole.

Section 13(d) amends section 1963 of title 18 to conform to changes in this bill.

Section 13(e) amends section 2114 of title 18 to make clear that it is not intended that the sentence in that section is mandatory.

Section 13(f) amends section 3006A of title 18 to reflect the new grading scheme in the sentencing provisions and to delete reference to revocation of parole, since parole is abolished by this title.

Section 13(g), (h), and (i)(2) amend sections 3156(b)(2), 3172(2), and 3401(h) of title 18 to reflect the new grading scheme set forth in section 3581 of title 18.

Subsection 13(i) also amends section 3401 by repealing subsection (g), which relates to magistrate sentencing in youth offender cases, since the youth offender provisions in current law have been repealed.

Section 13(j) of the bill amends cross-references in section 3670 (formerly section 3619) of title 18.

Section 13(k) of the bill deletes a reference to parole officers in section 4004.

Section 13(l) of the bill amends chapter 306 of title 18, relating to transfer of offenders to and from foreign countries, in several respects. First, it amends subsection (f) of section 4101 to include a term of supervised release in the definition of parole. Second, it amends subsection (g) of section 4101 to conform the description of probation to the provisions of proposed subchapter B of chapter 227 of title 18. Third, it amends section 4105(c) to bring a reference in paragraph (1) into conformity with the revised provisions relating to credit toward service of sentence for satisfactory behavior contained in proposed 18 U.S.C. 3624, to conform cross-references in paragraphs (1) and (2), to delete paragraph (3) because of the new provisions relating to good time set forth in proposed 18 U.S.C. 3624, and to amend paragraph (4) to delete references to forfeiture of good time as inconsistent with the provisions of proposed 18 U.S.C. 3624. Section 4106 is amended to place offenders who are on parole in a foreign country who are transferred to the United States under supervision by the probation system rather than the Parole Commission, which would be abolished by this bill, and to provide that an offender transferred to serve a term of imprisonment shall be released in accord with the provisions of proposed 18 U.S.C. 3624(a) after serving the period of time specified in the applicable sentencing guidelines (rather than the Parole Commission's setting the release date). If the guidelines recommend a term of supervised release for such an offender, the offender will be placed on such a term. The provisions of proposed 18 U.S.C. 3742 are made applicable to determination of a release date under the subsection, and the United States court of appeals for the district in which the offender is imprisoned or under supervision after transfer to the United States has jurisdiction to review the release date as though it had been set by the district court. Section 4106(c) is repealed, since it relates to parole release and parole has been abolished. Section 4108(a) is amended to require that, when an offender's consent to transfer to the United States is verified, the offender be informed of the applicable guideline sentence for his offense.

Section 13(m) of the bill amends section 4321 of title 18 to delete a reference to parole.

Section 13(n) of the bill amends section 4351(b) of title 18 to make the Chairman of the Sentencing Commission a member of the National Institute of Corrections Advisory Board in place of the Chairman of the Parole Commission.

Section 13(o) of the bill amends section 5002 of title 18 to make the Chairman of the Sentencing Commission a member of the Advisory Corrections Council, and to delete references to the Parole Commission.

Section 14 of the bill amends section 401(b)(1)(A), (b)(1)(B), (b)(2), (b)(5), and (c) and section 405 of the Controlled Substances Act to delete references to a special parole term for various drug trafficking offenses. Section 401(b)(4) is amended to conform to the fact that the special sentencing provisions for drug possession have been moved to proposed 18 U.S.C. 3607. Section 408(c) is amended to delete a reference to the current parole statutes.

Section 15 of the bill deletes references in the Controlled Substances Import and Export Act to special parole terms.

Section 16 of the bill amends section 114(b) of title 23, United States Code, to add a reference to a term of supervised release.

Section 17 of the bill amends section 5871 of the Internal Revenue Code of 1954 to delete a reference to eligibility for parole.

Section 18(a) of the bill amends section 509 of title 28 to delete a reference to the Parole Commission. Section 18(b) of the bill amends section 591 of title 28 to conform to the grading of misdemeanors and infractions.

Section 18(c) of the bill amends section 2901 of title 28 to add a reference to a term of supervised release and to conform a cross-reference to proposed chapter 227 of title 18.

Section 19 of the bill amends section 504(a) of the Labor Management Reporting and Disclosure Act of 1959, which forbids, with certain exceptions, a current or former member of the Communist Party or a person convicted of one of a list of specific offenses from holding office in a labor organization, to specify that the sentencing judge, rather than the Parole Commission, should decide whether a person convicted of a Federal offense can hold union office. If the offense is a State or local offense, a judge of the United States district court in which the offense was committed may, under the amendment, make the decision upon motion of the Department of Justice. Section 504(a) of the Labor Management Reporting and Disclosure Act of 1959 is also amended to specify that decisions under the section are to be made pursuant to sentencing guidelines and policy statements promulgated pursuant to proposed 28 U.S.C. 994(a). Section 504(a) is further amended by deleting a reference to administrative proceedings before the Board of Parole so as to conform with changes made in a reference to the sentencing court. Similar amendments are made by section 19 of the bill to section 411(a) of the Employee Retirement Income Security Act of 1974. In addition, section 411(c)(3) of the Employee Retirement Income Security Act of 1974 is amended by section 20 of the bill, to add a reference to a term of supervised release after a reference to parole.

Section 21 amends section 454(b) of the Comprehensive Employment and Training Act of 1973 to add a reference to a term of supervised release after a reference to parole.

Section 22(a) amends section 341(a) of the Public Health Service Act to delete references to hospitalization of drug addicts convicted of an offense and sentenced under the Narcotic Addict Rehabilitation Act of 1966 or the Federal Youth Corrections Act. Both those provisions are repealed by this bill in favor of permitting sentencing guidelines to recommend appropriate sentences for all combinations of offense and offender characteristics.

Section 343(d) of the Public Health Service Act is also amended by section 22 to add a reference to a term of supervised release after the reference to parole.

Section 23 of the bill amends section 11507 of title 49, United States Code, to add a reference to a term of supervised release after the reference to parole.

Section 24 amends section 10(b)(7) of the Military Selective Service Act (50 U.S.C. App. 460(b)(7)) to substitute a reference to "release" for a reference to "parole."

SECTION 25—EFFECTIVE DATE

Subsection (a) of section 25 contains the effective date provision for the Act. It provides that, with three exceptions, the Act will take effect on the first day of the first calendar month beginning twenty-four months after the date of enactment.

The first exception, contained in subsection (a)(1)(A), is that the repeal of the Federal Youth Corrections Act, chapter 402 of title 18, will take effect immediately.

The second exception, contained in subsection (a)(1)(B)(i), is that the provisions of chapter 58 of title 28, United States Code, relating to the creation and responsibilities of the United States Sentencing Commission, will take effect on the date of enactment. Paragraph (B) also specifies that the Sentencing Commission shall submit the initial sentencing guidelines promulgated pursuant to 28 U.S.C. 994(a)(1) to the Congress within 18 months of the date of enactment. Under subsection (a)(2), the terms of the first members of the United States Sentencing Commission will not begin to run for purposes of proposed 28 U.S.C. 992(a) until the sentencing guidelines are in effect pursuant to subsection (a)(1)(B)(ii) even though they will be appointed well before that time. The work of the Sentencing Commission in promulgating sentencing guidelines and policy statements is crucial to the effectiveness of the revised sentencing system set forth in the bill. It is essential that the work of the Sentencing Commission begin as soon after the date of enactment of this Act as possible.

The third exception, contained in subsection (a)(1)(B)(ii) is that the sentencing guidelines system will not replace the current law provisions relating to the imposition of sentence, the determination of a prison release date, and the calculation of good time allowances, until three events occur: First, the Sentencing Commission must have submitted the initial set of sentencing guidelines to the Congress along with a report of the reasons for its recommendations. Under subsection (a)(1)(B)(i), the Commission has 150 days from the date of enactment to make that submission. Second, the General Accounting Office must, within three months of the submission of the guidelines, conduct a study of the guidelines, and their potential impact in comparison with the operation of the existing sentencing and parole release system, and report its findings to the Congress. Third, the Congress must have six months after the guidelines have been submitted to it, during which the General Accounting Office has made its report pursuant to subsection (a)(1)(B)(ii), in which to examine the guidelines and consider the reports. This provision assures that there is ample opportunity for interested parties to examine the proposed initial guidelines before they are used to replace the existing sentencing system.

The Act will apply to any offense or other event occurring on or after the effective date. A sentence imposed before the effective date of the guidelines as to an individual imprisoned or on probation or parole on that date would not be affected by this Act. As to an offense committed prior to the effective date, the preexisting law will apply as to all substantive matters including the imposable sentence. If a trial occurs or a sentence is imposed on or after the effective date for an offense committed before the effective date, the procedural and administrative provisions of the Act will apply except to the extent that such provisions are inconsistent with the preexisting law.

Subsection (b) retains the Parole Commission and current law provisions related to parole in effect for the five-year period after the effective date of this Act in order to deal with sentences imposed under current sentencing practices. It also keeps the provisions as to a term of imprisonment in current law in effect during the period described in subsection (a)(1)(B). This will assure that the length of a term of imprisonment, and the parole and good time statutes, will remain in effect as to any prisoner sentenced before the sentencing guidelines and the provisions of proposed 18 U.S.C. 3553 and 3624 go into effect pursuant to subsection (a)(1)(B). All other aspects of the sentencing provisions will go into effect on the effective date of the Act as to any person sentenced after the effective date.

Most of those individuals incarcerated under the old system will be released during the five-year period. As to those individuals who have not been released at that time, the Parole Commission must set a release date for them prior to the expiration of the five years that is consistent with the applicable parole guidelines.[430]

Subsection (b) also assures that, while the Parole Commission remains in existence, the Chairman of the Parole Commission or his designee will remain a member of the National Institute of Corrections, and that the Chairman will remain a member of the Advisory Corrections Council ex officio and be an ex officio member of the United States Sentencing Commission.

SECTION 26—REVIEW BY CONGRESS

Section 26 of the bill requires the General Accounting Office to conduct a six-month study, four years after the effective date of the sentencing guidelines, of the operation of those guidelines compared with the current parole release system. The United States Sentencing Commission will be required to provide the GAO, all appropriate courts, the Department of Justice, and the Congress with a report detailing the operation of the sentencing guidelines and making recommendations. The report shall include an evaluation of the impact of the sentencing guidelines on prosecutorial discretion, plea bargaining, disparities in sentencing, and the use of incarceration. The report is to be issued by affirmative vote of a majority of the voting members of the Commission. These requirements are derived from language in 28 U.S.C. 994(p) of the original bill, and the amendments of the 98th Congress simply combined all the reporting requirements.

Congress will be required to review the GAO study, along with the Sentencing Commission report, to determine the effectiveness of the sentencing guidelines system, whether any changes are needed in the system and whether the parole system should be reinstated in some form.

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[430] The Committee intends that, in the final setting of release dates under this provision, the Parole Commission give the prisoner the benefit of the applicable new sentencing guideline if it is lower than the minimum parole guideline.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., September 7, 1983.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 668, the Sentencing Reform Act of 1983.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

RUDOLPH G. PENNER, *Director.*

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE, SEPTEMBER 7, 1983

1. Bill number: S. 668.
2. Bill title: Sentencing Reform Act of 1983.
3. Bill status: As reported by the Senate Committee on the Judiciary, August 4, 1983.
4. Bill purpose: This bill amends those sections of the United States Code relating to the sentencing of Federal offenders. A United States Sentencing Commission is established as an independent commission within the Judicial Branch. The Commission is to have seven voting members appointed by the President, with the advice and consent of the Senate. The Attorney General or his designee is also to serve on the Commission as a nonvoting member. The responsibilities of the Commission include establishing sentencing policies for the criminal justice system, and developing methods for measuring the effectiveness of alternate sentencing practices. The bill also raises the maximum fines which may be imposed on individuals and organizations, increases the cap on prisoner allotment payments from $100 to $500, and amends those sections of the United States Code and the Rules of Criminal Procedure dealing with the preparation of presentence reports.
5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1984	1985	1986	1987	1988
Estimated authorization level	5	8	8	8	9
Estimated outlays	5	8	8	8	9

The estimates in the table above do not reflect the increased revenues resulting from the higher fine levels specified by the bill or the increased outlays resulting from the higher prisoner allotment cap, since both are subject to discretionary action and cannot be reliably estimated at the present time.

The cost of this bill fall within budget function 750.

Basis of estimate: For purposes of this estimate, it is assumed that the bill be enacted by September 31, 1983. Thus, the establishment of the Sentencing Commission and the repeal of the Youth Corrections Act are assumed to become effective October 1, 1983, while the other sections of the bill would become effective October 1, 1985.

The Administrative Office of the United States Courts estimates that the Commission will require approximately 130 additional full-time staff, computer facilities and resources for the training of judges, magistrates, and probation officers. The estimated costs of the Commission, based on the data provided by the Office, total $5 million in 1984, $8 million in 1985, and between $6 million and $7 million in subsequent years.

The Federal government is also likely to realize increased revenues as a result of the provisions of the bill that raise the maximum limitation on fines. Under current law, fines are an authorized form of sentence for almost all offenses, but the maximum fine amount for a felony is limited to $10,000. The bill recodifies crimes into classes and prescribes maximum sentences and fines for each class. The maximum fine is increased to $250,000 for an individual convicted of a felony. Organizations may be fined up to a maximum of $500,000. The bill also requires the court to consider the defendant's ability to pay when determining the amount of the fine. It is not possible to estimate the amount of additional revenues that will be generated from increased fines, however, since there is no basis for predicting how the new ceilings will affect the amount of fines levied or collected. Nevertheless, the increased revenue is likely to be substantial, because the new limits are much higher than under current law, and because the bill authorizes collection procedures for criminal fines similar to those available to the Internal Revenue Service.

The cap on prisoner allotment payments is raised from $100 to $500 by the bill. This would not necessarily increase total release payments to offenders, however, since the size of the payments is determined by the Bureau of Prisons. If the number of prisoners receiving release payments in future years is the same as in 1982 (10,576 prisoners), and if each receives the new maximum of $500, the total increase in Federal expenditures would be about $4 million to $5 million annually. However, since many prisoners do not receive the maximum payment, even with the current limit, any increase in costs is likely to much smaller.

The bill also amends the laws governing the preparation of presentence reports on Federal offenders. Presentence reports are currently prepared in about 85 percent of the cases appearing before a judge. The Administrative Office of the United States Courts has indicated that the bill would have the effect of requiring a presentence report on virtually every offender. This process is estimated to cost approximately $2 million annually, beginning in fiscal year 1986.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: On September 7, 1983, the Congressional Budget Office prepared a cost estimate for S. 1762, the Comprehensive Crime Control Act of 1983, as reported by the Senate Committee on the Judiciary, August 4, 1983. Title II of S. 1762 is identical to S. 668, and has the same estimated cost.

9. Estimate prepared by: Charles Essick.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b), Rule XXVI of the Standing Rules of the Senate, it is hereby stated that the Committee anticipates that the bill will have no additional direct regulatory impact. After due consideration, the Committee concluded that the changes in existing law contained in the bill will not increase or diminish any present regulatory responsibilities of the United States Department of Justice or any other department or agency affected by the legislation.

ACTION BY THE COMMITTEE

On July 26, 1983, the Committee on the Judiciary considered and discussed S. 668, the Sentencing Reform Act of 1983. An amendment, in the nature of a substitute, was considered as indicated below. On July 26, 1983, by voice vote (Heflin voting no) the committee order the amended bill reported out with recommendation that it be passed by the Senate.

The following amendment was adopted by voice vote (Heflin voting no):

1. Kennedy Amendment to conform this bill to title II of the Comprehensive Crime Control Act of 1983, by substituting the text, as reported by the Committee July 21, 1983.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing laws proposed to be made by S. 668 are shown as follows: Existing law to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman.

UNITED STATES CODE

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TITLE 8: ALIENS AND NATIONALITY

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CHAPTER 12.—IMMIGRATION AND NATIONALITY

Subchapter I.—General Provisions

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PART II.—ADMISSION QUALIFICATIONS FOR ALIENS; TRAVEL CONTROL OF CITIZENS AND ALIENS

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§ 1182. Excludable aliens—General classes

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * * * *

(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime; except that aliens who have committed only one such crime while under the age of eighteen years may be granted a visa and admitted if the crime was committed more than five years prior to the date of the application for a visa or other documentation, and more than five years prior to date of application for admission to the United States, unless the crime resulted in confinement in a prison or correctional institution, in which case such alien must have been released from such confinement more than five years prior to the date of the application for a visa or other documentation, and for admission, to the United States. [Any alien who would be excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of section 1(3) of Title 18, by reason of the punishment actually imposed, or who would be excludable as one who admits the commission of an offense that is classifiable as a misdemeanor under the provisions of section 1(2) of Title 18, by reason of the punishment which might have been imposed upon him, may be granted a visa and admitted to the United States if otherwise admissible: *Provided*, That the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense.] *An alien who would be excludable because of the conviction of an offense for which the sentence actually imposed did not exceed a term of imprisonment in excess of six months, or who would be excludable as one who admits the commission of an offense for which a sentence not to exceed one year's imprisonment might have been imposed on him, may be granted a visa and admitted to the United States if otherwise admissible: Provided, That the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense.*

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Subchapter II—Immigration

PARTY V—DEPORTATION; ADJUSTMENT OF STATUS

§ 1252. Apprehension and deportation of aliens—Arrest and custody; review of determination by court

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SERVICE OF PRISON SENTENCE PRIOR TO DEPORTATION

(h) An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, *supervised release*, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.

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TITLE 16: CONSERVATION

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CHAPTER 1.—NATIONAL PARKS, MILITARY PARKS, MONUMENTS, AND SEASHORES

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§ 460k–3. Charges and fees; permits; regulations; penalties

The Secretary may establish reasonable charges and fees and issue permits for public use of national wildlife refuges, game ranges, national fish hatcheries, and other conservation areas administered by the Department of the Interior for fish and wildlife purposes. The Secretary may issue regulations to carry out the purposes of sections 460k to 460k–4 of this title. A violation of such regulations shall be a [petty offense (section 1 of Title 18)] *misdemeanor* with maximum penalties of imprisonment for not more than six months, or a fine of not more than $500, or both.

* * * * * * *

§ 460n–8. United States magistrate, appointment; functions; practice and procedure; probation; fees

A United States magistrate [1] shall be appointed for that portion of the Lake Mead National Recreation Area that is situated in Mohave County, Arizona. Such magistrate shall be appointed by the United States district court having jurisdiction thereover, and the magistrate shall serve as directed by such court, as well as pursuant to, and within the limits of, the authority of said court.

[The functions of such magistrate shall include the trial and sentencing of persons committing petty offenses, as defined in Title

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[1] Note. Sec. 212 of the bill amends 16 U.S.C. 460n–8 to change "commissioner" to "magistrate". Magistrate has already been inserted by the codifier per Public law 90–578, title IV, § 402, Oct. 17, 1968, Stat. 118.

18, section 1: *Provided,* That any person charged with a petty offense may elect to be tried in the district court of the United States, and the magistrate shall apprise the defendant of his right to make such election, but shall not proceed to try the case unless the defendant, after being so apprised, signs a written consent to be tried before the magistrate.] *The functions of the magistrate shall include the trial and sentencing of persons charged with the commission of misdemeanors and infractions as defined in section 3581 of title 18, United States Code.* The exercise of additional functions by the magistrate shall be consistent with and be carried out in accordance with the authority, laws, and regulations, of general application to United States magistrates. The provisions of Title 18, section 3402, and the rules of procedure and practice prescribed by the Supreme Court pursuant thereto, shall apply to all cases handled by such magistrate. The probation laws shall be applicable to persons tried by the magistrate and he shall have power to grant probation. The magistrate shall receive the fees, and none other, provided by law for like or similar services.

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TITLE 18: CRIMES AND CRIMINAL PROCEDURE

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[1] Heading of chapter amended without amending analysis.

[2] Chapter added without adding chapter heading to analysis.

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[§ 1. Offenses classified

[Notwithstanding any Act of Congress to the contrary:

[(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

[(2) Any other offense is a misdemeanor.

[(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.]

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[1] So in original. Does not conform to section catchline.

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§ 924. Penalties

(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both [, and shall become eligible for parole as the Board of Parole shall determine].

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CHAPTER 53—INDIANS

Sec.

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1161. Application of Indian liquor laws

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§ 1161. Application of Indian liquor laws

The provisions of sections 1154, 1156, 3113, 3488, and [3618] *3669* of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

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CHAPTER 85—PRISON-MADE GOODS

Sec.
1761. Transportation or importation.
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§ 1761. Transportation or importation

(a) Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, *supervised release*, or probation, or in any penal or reformatory institution, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

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CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec.

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1963. Criminal penalties.

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§ 1963. Criminal penalties.

[(a)] Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States [(1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.] *the property described in section 3554 in accord with the provisions of that section.*

[(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

[(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provisions for the rights of innocent persons.]

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2114. Mail, money, or other property of United States.
2115. Post office.
2116. Railway or steamboat post office.
2117. Breaking or entering carrier facilities.

* * * * * * *

§ 2114. Mail, money or other property of United States

Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned *not more than* twenty-five years.

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[3012. Orders respecting persons in custody.] *[3012. Repealed.]*

[1] So in original. Catchline reads "court room".

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§ 3006A. Adequate representation of defendants

(a) Choice of plan.—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation of any person financially unable to obtain adequate representation (1) who is charged with a felony or [misdemeanor (other than a petty offense as defined in section 1 of this title)] *Class A misdemeanor* or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, (2) who is under arrest, when such representation is required by law, (3) who is [subject to revocation of parole,] in custody as a material witness, or seeking collateral relief, as provided in subsection (g), or, (4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. Representation under each plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. Each plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a substantial proportion of cases, either of the following or both:

(1) attorneys furnished by a bar association or a legal aid agency; or

(2) attorneys furnished by a defender organization established in accordance with the provisions of subsection (h).

* * * * * * *

(b) APPOINTMENT OF COUNSEL.—Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In every criminal case in which the defendant is charged with a felony or a [misdemeanor (other than a petty offense as defined in section 1 of this title)] *Class A misdemeanor* or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation and appears without counsel, the United States magistrate or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate or the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

* * * * * * *

(g) DISCRETIONARY APPOINTMENTS.—Any person [subject to revocation of parole,] in custody as a material witness, or seeking relief under section 2241, 2254, or 2255 of title 28 or section 4245 of title 18 may be furnished representation pursuant to the plan whenever the United States magistrate or the court determines that the interests of justice so require and such person is financially unable to obtain representation. Payment for such representation may be as provided in subsections (d) and (e).

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[§ 3012. Orders respecting persons in custody

[Prisoners or persons in custody shall be brought into court or returned on order of the Court or of the United States Attorney, for which no fee shall be charged and no writ required.]

* * * * * * *

CHAPTER 207—RELEASE

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* * * * * * *

§ 3156. Definitions

(a) As used in sections 3146-3150 of this chapter—

* * * * * * *

(b) As used in sections 3152-3155 of this chapter—

* * * * * * *

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a [petty offense as defined in section 1(3) of this title] *Class B or C misdemeanor or an infraction,* or an offense triable by court-martial, military commission, provost court, or other military tribunal).

* * * * * * *

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§ 3172. Definitions

As used in this chapter—

* * * * * * *

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a [petty offense as defined in section 1(3) of this title] *Class B or C misdemeanor or an infraction,* or an offense triable by court-martial, military commission, provost court, or other military tribunal).

* * * * * * *

CHAPTER 219—TRIAL BY UNITED STATES MAGISTRATES

§ 3401. Misdemeanors; application of probation laws.

Sec.
3401. Misdemeanors; application of probation laws.
3402. Rules of procedure, practice and appeal.

* * * * * * *

[(g) The magistrate may, in a case involving a youth offender in which consent to trial before a magistrate has been filed under subsection (b) of this section, impose sentence and exercise the other powers granted to the district court under chapter 402 and section 4216 of this title, except that—

[(1) the magistrate may not sentence the youth offender to the custody of the Attorney General pursuant to such chapter for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense;

[(2) such youth offender shall be released conditionally under supervision no later than 3 months before the expiration of the term imposed by the magistrate, and shall be discharged unconditionally on or before the expiration of the maximum sentence imposed; and

[(3) the magistrate may not suspend the imposition of sentence and place the youth offender on probation for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense.]

(h) The magistrate may, in a [petty offense case] *Class B or C misdemeanor case, or infraction case,* involving a juvenile in which consent to trial before a magistrate has been filed under subsection (b) of this section, exercise all powers granted to the district court under chapter 403 of this title. For purposes of this subsection, proceedings under chapter 403 of this title may be instituted against a juvenile by a violation notice or complaint, except that no such case may proceed unless the certification referred to in section 5032 of this title has been filed in open court at the arraignment. No term of imprisonment shall be imposed by the magistrate in any such case.

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[CHAPTER 227—SENTENCE, JUDGMENT, AND EXECUTION

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[3562. Sentence—Rule.
[3563. Corruption of blood or forfeiture of estate.
[3564. Pillory and whipping.
[3565. Collection and payment of fines and penalties.
[3566. Execution of death sentence.
[3567. Death sentence may prescribe dissection.
[3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence.
[3569. Discharge of indigent prisoner.
[3570. Presidential remission as affecting unremitted part.
[3571. Clerical mistakes—Rule.
[3572. Correction or reduction of sentence—Rule.
[3573. Arrest or setting aside of judgment—Rule.
[3574. Stay of execution; supersedeas—Rule.
[3575. Increased sentence for dangerous special offenders.
[3576. Review of sentence.
[3577. Use of information for sentencing.
[3578. Conviction records.]

[§ 3561. Judgment form and entry—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[Judgment to be signed by judge and entered by clerk, Rule 32(b).]

[§ 3562. Sentence—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[Imposition of sentence; commitment; bail; presentence investigation and report, Rule 32(a, c).]

[§ 3563. Corruption of blood or forfeiture of estate

[No conviction or judgment shall work corruption of blood or any forfeiture of estate.]

[§ 3564. Pillory and whipping

[The punishment of whipping and of standing in the pillory shall not be inflicted.]

[§ 3565. Collection and payment of fines and penalties

[In all criminal cases in which judgment or sentence is rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, such judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases. Where the judgment directs imprisonment until the fine or penalty imposed is paid, the issue of execution on the judgment shall not discharge the defendant from imprisonment until the amount of the judgment is paid.]

[§ 3566. Execution of death sentence

[The manner of inflicting the punishment of death shall be that prescribed by the laws of the place within which the sentence is imposed. The United States marshal charged with the execution of the sentence may use available local facilities and the services of an appropriate local official or employ some other person for such purpose, and pay the cost thereof in an amount approved by the Attorney General. If the laws of the place within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other place in which such sentence shall be executed in the manner prescribed by the laws thereof.]

[§ 3567. Death sentence may prescribe dissection

[The court before which any person is convicted of murder in the first degree, or rape, may, in its discretion, add to the judgment of death, that the body of the offender be delivered to a surgeon for dissection; and the marshal who executes such judgment shall deliver the body, after execution, to such surgeon as the court may direct; and such surgeon, or some person appointed by him, shall receive and take away the body at the time of execution.]

[§ 3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence

[The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

[If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

[No sentence shall prescribe any other method of computing the term.]

[§ 3569. Discharge of indigent prisoner

[(a) When a poor convict, sentenced for violation of any law of the United States by any court established by enactment of Congress, to be imprisoned and pay a fine, or fine and costs, or to pay a fine, or fine and costs, has been confined in prison thirty days, solely for the nonpayment of such fine, or fine and costs, such convict may make application in writing to the nearest United States magistrate in the district where he is imprisoned setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the magistrate shall proceed to hear and determine the matter.

[If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding $20 in value, except such as is by law exempt from being taken on execution for debt, the magistrate shall administer to him the following oath: "I do solemnly swear that I have not any property, real or personal, exceeding $20, except such as is by law exempt from being taken on civil process for debt; and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God." Upon taking such oath such convict shall be discharged; and the magistrate shall file with the institution in which the convict is confined, a certificate setting forth the facts. In case the convict is found by the magistrate to possess property valued at an amount in excess of said exemption, nevertheless, if the Attorney General finds that the retention by such convict of all of such property is reasonably necessary for his support or that of his family, such convict shall be released without further imprisonment solely for the nonpayment of such fine, or fine and costs; or if he finds that the retention by such convict of any part of such property is reasonably necessary for his support or that of his family, such convict shall be released without further imprisonment solely for nonpayment of such fine or fine and costs upon payment on account of his fine and costs, of that portion of his property in excess of the amount found to be reasonably necessary for his support or that of his family.

[(b) Any such indigent prisoner in a Federal institution may, in the first instance, make his application to the warden of such institution, who shall have all the powers of a United States magistrate in such matters, and upon proper showing in support of the application shall administer the oath required by subsection (a) of this section, discharge the prisoner, and file his certificate to that effect in the records of the institution.

[Any such indigent prisoner, to whom the warden shall fail or refuse to administer the oath may apply to the nearest magistrate for the relief authorized by this section and the magistrate shall proceed de novo to hear and determine the matter.

[§ 3570. Presidential remission as affecting unremitted part

[Whenever, by the judgment of any court or judicial officer of the United States, in any criminal proceeding, any person is sentenced to two kinds of punishment, the one pecuniary and the other corporal, the President's remission in whole or in part of either kind shall not impair the legal validity of the other kind, or of any portion of either kind, not remitted.]

[§ 3571. Clerical mistakes—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[Court empowered to correct clerical mistakes in judgments, orders, or record, Rule 36.]

[§3572. Correction or reduction of sentence—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[Court empowered to correct or reduce sentence; time, Rule 35.]

[§ 3573. Arrest or setting aside of judgment—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[Arrest of judgment, grounds and motion, time, Rule 34.

[Setting aside judgment and permitting withdrawal of plea of guilty, Rule 32(d).]

[§ 3574. Stay of execution; supersedes—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[Death or imprisonment sentence, fines stayed on appeal; conditions and power of court, Rule 38(a).]

[§ 3575. Increased sentence for dangerous special offenders

[(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender and his counsel.

[(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

[(c) This section shall not prevent the imposition and execution of a sentence of death or of imprisonment for life or for a term exceeding twenty-five years upon any person convicted of an offense so punishable.

[(d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special offender to less than any mandatory minimum penalty prescribed by law for such felony. This section shall not be construed as creating any mandatory minimum penalty.

[(e) A defendant is a special offender for purposes of this section if—

[(1) the defendant has previously been convicted in courts of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year under applicable laws of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof; or

[(2) the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

[(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such conduct. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938 (52 Stat. 1602, as amended 80 Stat. 838), and as hereafter amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of the Internal Revenue Act of 1954 (68A Stat. 17, as amended 83 Stat. 655), and as hereafter amended. For purposes of paragraph (2) of this subsection, special skill or expertise in criminal conduct includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension for such conduct, or the disposition of the fruits or proceeds of such conduct. For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

[(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant.

[(g) The time for taking an appeal from a conviction for which sentence is imposed after proceedings under this section shall be measured from imposition of the original sentence.]

[§ 3576. Review of sentence

[With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.]

[CHAPTER 229—FINES, PENALTIES AND FORFEITURES

[*Sec.*
[3611. Firearms possessed by convicted felons.
[3612. Bribe moneys.
[3613. Fines for setting grass and timber fires.
[3614. Fine for seduction.
[3615. Liquors and related property; definitions.
[3616. Repealed.
[3617. Remission or mitigation of forfeitures under liquor laws; possession pending trial.
[3618. Conveyances carrying liquor.
[3619. Disposition of conveyances seized for violation of the Indian liquor laws.
[3620. Vessels carrying explosives and steerage passengers.]

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[§ 3613. Fines for setting grass and timber fires

[In all cases arising under sections 1855 and 1856 of this title the fines collected shall be paid into the public-school fund of the county in which the lands where the offense was committed are situated.]

[§ 3614. Fine for seduction

[When a person is convicted of a violation of section 2198 of this title and fined, the court may direct that the amount of the fine, when paid, be paid for the use of the female seduced, or her child, if she has any.]

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[CHAPTER 231—PROBATION

[*Sec.*
[3651. Suspension of sentence and probation.
[3652. Probation—Rule.
[3653. Report of probation officer and arrest of probationer.
[3654. Appointment and removal of probation officers.
[3655. Duties of probation officers.
[3656. Duties of Director of Administrative Office of the United States Courts]

[§ 3651. Suspension of sentence and probation

[Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

[Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

[Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

[The court may revoke or modify any condition of probation, or may change the period of probation.

[The period of probation, together with any extension thereof, shall not exceed five years.

[While on probation and among the conditions thereof, the defendant—

[May be required to pay a fine in one or several sums; and

[May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

[May be required to provide for the support of any persons, for whose support he is legally responsible.

[The court may require a person as conditions of probation to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of probation: *Provided*, That the Attorney General certifies that adequate treatment facilities, personnel, and programs are available. If the Attorney General determines that the person's residence in the center or participation in its program, or both, should be terminated, because the person can derive no further significant benefits from such residence or participation, or both, or because his such residence or participation adversely affects the rehabilitation of other residents or participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

[A person residing in a residential community treatment center may be required to pay such costs incident to residence as the Attorney General deems appropriate.

[The court may require a person who is an addict within the meaning of section 4251(a) of this title, or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201), as a condition of probation, to participate in the community supervision programs authorized by section 4255 of this title for all or part of the period of probation.

[The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.]

[§ 3652. Probation—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[Probation as provided by law, Rule 32(e).
[Presentence investigation, Rule 32(c).]

[§ 3653. Report of probation officer and arrest of probationer

[When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

[Whenever during the period of his probation, a probationer heretofore or hereafter placed on probation, goes from the district in which he is being supervised to another district, jurisdiction over him may be transferred, in the discretion of the court, from the court for the district from which he goes to the court for the other district, with the concurrence of the latter court. Thereupon the court for the district to which jurisdiction is transferred shall have all power with respect to the probationer that was previously possessed by the court for the district from which the transfer is made except that the period of probation shall not be changed without the consent of the sentencing court. This process under the same conditions may be repeated whenever during the period of his probation the probationer goes from the district in which he is being supervised to another district.

[At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by section 3651 of this title, the court for the district in which the probationer is being supervised or if he is no longer under supervision, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occuring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

[As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.]

[§ 3654. Appointment and removal of probation officers

[Any court having original jurisdiction to try offenses against the United States may appoint one or more suitable persons to serve as probation officers within the jurisdiction and under the direction of the court making such appointment.

[All such probation officers shall serve without compensation except that in case it shall appear to the court that the needs of the service require that there should be salaried probation officers, such court may appoint such officers.

[Such court may in its discretion remove a probation officer serving in such court.

[The appointment of a probation officer shall be in writing and shall be entered on the records of the court, and a copy of the order of appointment shall be delivered to the officer so appointed and a copy sent to the Director of the Administrative Office of the United States Courts.

[Whenever such court shall have appointed more than one probation officer, one may be designated chief probation officer and shall direct the work of all probation officers serving in such court.]

[§ 3655. Duties of probation officers

[The probation officer shall furnish to each probationer under his supervision a written statement of the conditions of probation and shall instruct him regarding the same.

[He shall keep informed concerning the conduct and condition of each probationer under his supervision and shall report thereon to the court placing such person on probation.

[He shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid probationers and to bring about improvements in their conduct and condition.

[He shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the Director of the Administrative Office of the United States Courts as he may at any time require; and shall perform such other duties as the court may direct.

[Each probation officer shall perform such duties with respect to persons on parole as the United States Parole Commission shall request.]

CHAPTER 227—SENTENCES

Subchapter
A. General Provisions *3551*
B. Probation *3561*
C. Fines *3571*
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SUBCHAPTER A—GENERAL PROVISIONS

Sec.
3551. Authorized sentences.

3552. Presentence reports.
3553. Imposition of a sentence.
3554. Order of criminal forfeiture.
3555. Order of notice to victims.
3556. Order of restitution.
3557. Review of a sentence.
3558. Implementation of a sentence.
3559. Sentencing classification of offenses.

SUBCHAPTER A—GENERAL PROVISIONS

§ 3551. Authorized sentences

(a) In General.—Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) Individuals.—An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

(c) Organizations.—An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

(1) a term of probation as authorized by subchapter B; or

(2) a fine as authorized by subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

§ 3552. Presentence reports

(a) Presentence Investigation and Report by Probation Officer.—A United States probation officer shall make a presentence investigation of a defendant that is required pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, and shall, before the imposition of sentence, report the results of the investigation to the court.

(b) Presentence Study and Report by Bureau of Prisons.—If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a misdemeanor or felony, it may order a study of the defendant. The study shall be conducted in the local community by qualified consultants unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau of Prisons or there are no adequate professional resources available in the local community to perform the study. The period of the study shall take no more than sixty days. The order

shall specify the additional information that the court needs before determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for the offense committed. The study shall inquire into such matters as are specified by the court and any other matters that the Bureau of Prisons or the professional consultants believe are pertinent to the factors set forth in section 3553(a). The period of the study may, in the discretion of the court, be extended for an additional period of not more than sixty days. By the expiration of the period of the study, or by the expiration of any extension granted by the court, the United States marshal shall return the defendant to the court for final sentencing. The Bureau of Prisons or the professional consultants shall provide the court with a written report of the pertinent results of the study and make to the court whatever recommendations the Bureau or the consultants believe will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau or the consultants concerning the guidelines and policy statements, promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994(a), that they believe are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under this chapter.

(c) PRESENTENCE EXAMINATION AND REPORT BY PSYCHIATRIC OR PSYCHOLOGICAL EXAMINERS.—If the court, before or after its receipt of a report specified in subsection (a) or (b) desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, it may order that the defendant undergo a psychiatric or psychological examination and that the court be provided with a written report of the results of the examination pursuant to the provisions of section 4247.

(d) DISCLOSURE OF PRESENTENCE REPORTS.—The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant.

§ 3553. Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentenced imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced; and

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the sentence does not include an order of restitution, the court shall include in the statement the reason therefor. The clerk of the court shall provide a transcription of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE OR RESTITUTION.—Prior to imposing an order of notice pursuant to section 3555, or an order of restitution pursuant to section 3556, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

§ 3554. Order of criminal forfeiture

The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

§ 3555. Order of notice to victims

The court, in imposing a sentence on a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices, may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant give reasonable notice and explanation of the conviction, in such form as the court may approve, to the victims of the offense. The notice may be ordered to be given by mail, by advertising in designated areas or through designated media, or by other appropriate means. In determining whether to require the defendant to give such notice, the court shall consider the factors set forth in section 3553(a) to the extent that they are applicable and shall consider the cost involved in giving the notice as it relates to the loss caused by the offense, and shall not require the defendant to bear the costs of notice in excess of $20,000.

§ 3556. Order of restitution

The court, in imposing a sentence on a defendant who has been found guilty of an offense under this title, or an offense under section 902 (h), (i), (j), or (n) of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant make restitution to any victim of the offense in accordance with the provisions of sections 3663 and 3664.

§ 3557. Review of a sentence

The review of a sentence imposed pursuant to section 3551 is governed by the provisions of section 3742.

§ 3558. Implementation of a sentence

The implementation of a sentence imposed pursuant to section 3551 is governed by the provisions of chapter 229.

§ 3559. Sentencing classification of offenses

(a) CLASSIFICATION.—An offense that is not specifically classified by a letter grade in the section defining it, is classified—

(1) if the maximum term of imprisonment authorized is—

(A) life imprisonment, or if the maximum penalty is death, as a Class A felony;

(B) twenty years or more, as a Class B felony;

(C) less than twenty years but ten or more years, as a Class C felony;

(D) less than ten years but five or more years, as a Class D felony;

(E) less than five years but more than one year, as a Class E felony;

(F) one year or less but more than six months, as a Class A misdemeanor;

(G) six months or less but more than thirty days, as a Class B misdemeanor;

(H) thirty days or less but more than five days, as a Class C misdemeanor; or

(I) five days or less, or if no imprisonment is authorized, as an infraction.

(b) EFFECT OF CLASSIFICATION.—An offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation except that:

(1) the maximum fine that may be imposed is the fine authorized by the statute describing the offense, or by this chapter, whichever is the greater; and

(2) the maximum term of imprisonment is the term authorized by the statute describing the offense.

SUBCHAPTER B—PROBATION

Sec.
3561. Sentence of probation.
3562. Imposition of a sentence of probation.
3563. Conditions of probation.
3564. Running of a term of probation.
3565. Revocation of probation.
3566. Implementation of a sentence of probation.

SUBCHAPTER B—PROBATION

§ 3561. Sentence of probation

(a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—

(1) the offense is a Class A or Class B felony;

(2) the offense is an offense for which probation has been expressly precluded; or

(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense.

(b) AUTHORIZED TERMS.—The authorized terms of probation are—

(1) for a felony, not less than one nor more than five years;

(2) for a misdemeanor, not more than five years; and

(3) for an infraction, not more than one year.

§ 3562. Imposition of a sentence of probation

(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF PROBATION.—The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.

(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence of probation can subsequently be—

(1) modified or revoked pursuant to the provisions of section 3564 or 3565;

(2) corrected pursuant to the provisions of rule 35 and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

§ 3563. Conditions of probation

(a) MANDATORY CONDITIONS.—The court shall provide, as an explicit condition of a sentence of probation—

(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation; and

(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13).

(b) DISCRETIONARY CONDITIONS.—The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553 (a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—

(1) support his dependents and meet other family responsibilities;

(2) pay a fine imposed pursuant to the provisions of subchapter C;

(3) make restitution to a victim of the offense pursuant to the provisions of section 3556;

(4) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555;

(5) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;

(6) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;

(7) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;

(8) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(9) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(10) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;

(11) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more

than the lesser of one year or the term of imprisonment authorized for the offense in section 3581(b), during the first year of the term of probation;

(12) reside at, or participate in the program of, a community corrections facility for all or part of the term of probation;

(13) work in community service as directed by the court;

(14) reside in a specified place or area, or refrain from residing in a specified place or area;

(15) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;

(16) report to a probation officer as directed by the court or the probation officer;

(17) permit a probation officer to visit him at his home or elsewhere as specified by the court;

(18) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;

(19) notify the probation officer promptly if arrested or questioned by a law enforcement officer; or

(20) satisfy such other conditions as the court may impose.

(c) MODIFICATIONS OF CONDITIONS.—The court may, after a hearing, modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the conditions of probation.

(d) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

§ 3564. Running of a term of probation

(a) COMMENCEMENT.—A term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court.

(b) CONCURRENCE WITH OTHER SENTENCES.—Multiple terms of probation, whether imposed at the same time or at different times, run concurrently with each other. A term of probation runs concurrently with any Federal, State, or local term of probation, or supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation, except that it does not run during any period in which the defendant is imprisoned for a period of at least 30 consecutive days in connection with a conviction for a Federal, State, or local crime.

(c) EARLY TERMINATION.—The court, after considering the factors set forth in section 3553(a) to the extent that they are applicable, may terminate a term of probation previously ordered and discharge the defendant at any time in the case of a misdemeanor or an infraction or at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.

(d) EXTENSION.—The court may, after a hearing, extend a term of probation, if less than the maximum authorized term was previously imposed, at any time prior to the expiration or termination of the

term of probation, pursuant to the provisions applicable to the initial setting of the term of probation.

(e) Subject to Revocation.—A sentence of probation remains conditional and subject to revocation until its expiration or termination.

§ 3565. Revocation of probation

(a) Continuation or Revocation.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable—

(1) continue him on probation, with or without extending the term of modifying or enlarging the conditions; or

(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

(b) Delayed Revocation.—The power of the court to revoke a sentence of probation for violation of a condition of probation, and to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

§ 3566. Implementation of a sentence of probation

The implementation of a sentence of probation is governed by the provisions of subchapter A of chapter 229.

SUBCHAPTER C—FINES

Sec.
3571. Sentence of fine.
3572. Imposition of a sentence of fine.
3573. Modification or remission of fine.
3574. Implementation of a sentence of fine.

SUBCHAPTER C—FINES

§ 3571. Sentence of fine

(a) In General.—A defendant who has been found guilty of an offense may be sentenced to pay a fine.

(b) Authorized Fines.—Except as otherwise provided in this chapter, the authorized fines are—

(1) if the defendant is an individual—

(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $250,000;

(B) for any other misdemeanor, not more than $25,000; and

(C) for an infraction, not more than $1,000; and

(2) if the defendant is an organization—

(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $500,000;

(B) for any other misdemeanor, not more than $100,000; and

(C) for an infraction, not more than $10,000.

§ 3572. Imposition of a sentence of fine

(a) FACTORS TO BE CONSIDERED IN IMPOSING FINE.—The court, in determining whether to impose a fine, and, if a fine is to be imposed, in determining the amount of the fine, the time for payment, and the method of payment, shall consider—

(1) the factors set forth in section 3553(a), to the extent they are applicable, including, with regard to the characteristics of the defendant under section 3553(a), the ability of the defendant to pay the fine in view of the defendant's income, earning capacity, and financial resources and, if the defendant is an organization, the size of the organization;

(2) the nature of the burden that payment of the fine will impose on the defendant, and on any person who is financially dependent upon the defendant;

(3) any restitution or reparation made by the defendant to the victim of the offense, and any obligation imposed upon the defendant to make such restitution or reparation to the victim of the offense;

(4) if the defendant is an organization, any measure taken by the organization to discipline its employees or agents responsible for the offense or to insure against a recurrence of such an offense; and

(5) any other pertinent equitable consideration.

(b) LIMIT ON AGGREGATE OF MULTIPLE FINES.—Except as otherwise expressly provided, the aggregate of fines that a court may impose on a defendant at the same time for different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage, is twice the amount imposable for the most serious offense.

(c) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

(1) modified or remitted pursuant to the provisions of section 3573;

(2) corrected pursuant to the provisions of rule 35 and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(d) TIME AND METHOD OF PAYMENT.—At the time a defendant is sentenced to pay a fine, the court may provide for the payment to be made within a specified period of time or in specified installments. If no such provision is made a part of the sentence, payment is due immediately.

(e) ALTERNATIVE SENTENCE PRECLUDED.—At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be served in the event that the fine is not paid.

(f) INDIVIDUAL RESPONSIBILITY FOR PAYMENT.—If a fine is imposed on an organization, it is the duty of each individual authorized to make disbursement of the assets of the organization to pay the fine from assets of the organization. If a fine is imposed on an agent or shareholder of an organization, the fine shall not be paid,

directly or indirectly, out of the assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

§ 3573. Modification or remission of fine

(a) PETITION FOR MODIFICATION OR REMISSION.—A defendant who has been sentenced to pay a fine, and who—

(1) has paid part but not all thereof, and concerning whom the circumstances no longer exist that warranted the imposition of the fine in the amount imposed or payment by the time or method specified, may petition the court for—

(A) an extension of the time for payment;

(B) a modification in the method of payment; or

(C) a remission of all or part of the unpaid portion; or

(2) has thereafter voluntarily made restitution or reparation to the victim of the offense, may petition the court for a remission of the unpaid portion of the fine in an amount not exceeding the amount of such restitution or reparation.

(b) ORDER OF MODIFICATION OR REMISSION.—If, after the filing of a petition as provided in subsection (a), the court finds that the circumstances warrant relief, the court may enter an appropriate order.

§ 3574. Implementation of a sentence of fine

The implementation of a sentence to pay a fine is governed by the provisions of subchapter B of chapter 229.

SUBCHAPTER D—IMPRISONMENT

Sec.

3581. Sentence of imprisonment.
3582. Imposition of a sentence of imprisonment.
3583. Inclusion of a term of supervised release after imprisonment.
3584. Multiple sentences of imprisonment.
3585. Calculation of a term of imprisonment.
3586. Implementation of a sentence of imprisonment.

SUBCHAPTER D—IMPRISONMENT

§ 3581. Sentence of imprisonment

(a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment.

(b) AUTHORIZED TERMS.—The authorized terms of imprisonment are—

(1) for a Class A felony, the duration of the defendant's life or any period of time;

(2) for a Class B felony, not more than twenty-five years;

(3) for a Class C felony, not more than twelve years;

(4) for a Class D felony, not more than six years;

(5) for a Class E felony, not more than three years;

(6) for a Class A misdemeanor, not more than one year;

(7) for a Class B misdemeanor, not more than six months;

(8) for a Class C misdemeanor, not more than thirty days; and

(9) for an infraction, not more than five days.

§ 3582. Imposition of a sentence of imprisonment

(a) Factors To Be Considered in Imposing a Term of Imprisonment.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) Effect of Finality of Judgment.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(n), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

(d) Inclusion of an Order To Limit Criminal Association of Organized Crime and Drug Offenders.—The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a

part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In General.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.

(b) Authorized Terms of Supervised Release.—The authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than three years;

(2) for a Class C or Class D felony, not more than two years; and

(3) for a Class E felony, or for a misdemeanor, not more than one year.

(c) Factors To Be Considered in Including a Term of Supervised Release.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

(d) Conditions of Supervised Release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553 (a)(1), (a)(2)(B), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553 (a)(2)(B) and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563 (b)(1) through (b)(10) and (b)(12) through (b)(19), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

(e) Modification of Term or Conditions.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6)—

(1) terminate a term of supervised release previously ordered and discharge the person released at any time after the expiration of one year of supervised release, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;

(2) after a hearing, extend a term of supervised release if less than the maximum authorized term was previously imposed,

and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions applicable to the initial setting of the term and conditions of post-release supervision; or

(3) treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of this title.

(f) Written Statement of Conditions.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

§ 3584. Multiple sentences of imprisonment

(a) Imposition of Concurrent or Consecutive Terms.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) Factors To Be Considered in Imposing Concurrent or Consecutive Terms.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) Treatment of Multiple Sentence as an Aggregate.—Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

§ 3585. Calculation of a term of imprisonment

(a) Commencement of Sentence.—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b) Credit for Prior Custody.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

§ 3586. Implementation of a sentence of imprisonment

The implementation of a sentence of imprisonment is governed by the provisions of subchapter C of chapter 229 and, if the sentence includes a term of supervised release, by the provisions of subchapter A of chapter 229.

CHAPTER 229—POSTSENTENCE ADMINISTRATION

Subchapter

A. Probation *3601*
B. Fines *3611*
C. Imprisonment *3621*

SUBCHAPTER A—PROBATION

Sec.

3601. Supervision of probation.
3602. Appointment of probation officers.
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3604. Transportation of a probationer.
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3606. Arrest and return of a probationer.
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SUBCHAPTER A—PROBATION

§ 3601. Supervision of probation

A person who has been sentenced to probation pursuant to the provisions of subchapter B of chapter 227, or placed on probation pursuant to the provisions of chapter 403, or placed on supervised release pursuant to the provisions of section 3583, shall, during the term imposed, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court.

§ 3602. Appointment of probation officers

(a) APPOINTMENT.—A district court of the United States shall appoint qualified persons to serve, with or without compensation, as probation officers within the jurisdiction and under the direction of the court making the appointment. The court may, for cause, remove a probation officer appointed to serve with compensation, and may, in its discretion, remove a probation officer appointed to serve without compensation.

(b) RECORD OF APPOINTMENT.—The order of appointment shall be entered on the records of the court, a copy of the order shall be delivered to the officer appointed, and a copy shall be sent to the Director of the Administrative Office of the United States Courts.

(c) CHIEF PROBATION OFFICER.—If the court appoints more than one probation officer, one may be designated by the court as chief probation officer and shall direct the work of all probation officers serving in the judicial district.

§ 3603. Duties of probation officers

A probation officer shall—

(a) instruct a probationer or a person on supervised release, who is under his supervision, as to the conditions specified by

the sentencing court, and provide him with a written statement clearly setting forth all such conditions;

(b) keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of a probationer or a person on supervised release, who is under his supervision, and report his conduct and condition to the sentencing court;

(c) use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition;

(d) be responsible for the supervision of any probationer or a person on supervised release who is known to be within the judicial district;

(e) keep a record of his work, and make such reports to the Director of the Administrative Office of the United States Courts as the Director may require;

(f) upon request of the Attorney General or his designee, supervise and furnish information about a person within the custody of the Attorney General while on work release, furlough, or other authorized release from his regular place of confinement, or while in prerelease custody pursuant to the provisions of section 3624(c); and

(g) perform any other duty that the court may designate.

§ 3604. Transportation of a probationer

A court, after imposing a sentence of probation, may direct a United States marshal to furnish the probationer with—

(a) transportation to the place to which he is required to proceed as a condition of his probation; and

(b) money, not to exceed such amount as the Attorney General may prescribe, for subsistence expenses while traveling to his destination.

§ 3605. Transfer of jurisdiction over a probationer

A court, after imposing a sentence, may transfer jurisdiction over a probationer or person on supervised release to the district court for any other district to which the person is required to proceed as a condition of his probation or release, or is permitted to proceed, with the concurrence of such court. A later transfer of jurisdiction may be made in the same manner. A court to which jurisdiction is transferred under this section is authorized to exercise all powers over the probationer or releasee that are permitted by this subchapter or subchapter B or D of chapter 227.

§ 3606. Arrest and return of a probationer

If there is probable cause to believe that a probationer or a person on supervised release has violated a condition of his probation or release, he may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. A probation officer may make such an arrest wherever the probationer or releasee is found, and may make the arrest without a warrant. The court having supervision of the probationer or releasee, or, if there is no such court, the court last having supervision of the pro-

bationer or releasee, may issue a warrant for the arrest of a probationer or releasee for violation of a condition of release, and a probation officer or United States marshal may execute the warrant in the district in which the warrant was issued or in any district in which the probationer or releasee is found.

§ 3607. Special probation and expungement procedures for drug possessors

(a) PRE-JUDGMENT PROBATION.—If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)—

(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

(2) has not previously been the subject of a disposition under this subsection;

the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565.

(b) RECORD OF DISPOSITION.—A nonpublic record of a disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition provided in subsection (a) or the expungement provided in subsection (c). A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

(c) EXPUNGEMENT OF RECORD OF DISPOSITION.—If the case against a person found guilty of an offense under section 404 of the Controlled Substances Act (21 U.S.C. 844) is the subject of a disposition under subsection (a), and the person was less than twenty-one years old at the time of the offense, the court shall enter an expungement order upon the application of such person. The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement

by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

SUBCHAPTER B—FINES

Sec.
3611. Payment of a fine.
3612. Collection of an unpaid fine.
3613. Lien provisions for satisfaction of an unpaid fine.

SUBCHAPTER B—FINES

§ 3611. Payment of a fine

A person who has been sentenced to pay a fine pursuant to the provisions of subchapter C of chapter 227 shall pay the fine immediately, or by the time and method specified by the sentencing court, to the clerk of the court. The clerk shall forward the payment to the United States Treasury.

§ 3612. Collection of an unpaid fine

(a) CERTIFICATION OF IMPOSITION.—If a fine is imposed, the sentencing court shall promptly certify to the Attorney General—

(1) the name of the person fined;
(2) his last known address;
(3) the docket number of the case;
(4) the amount of the fine imposed;
(5) the time and method of payment specified by the court;
(6) the nature of any modification or remission of the fine; and
(7) the amount of the fine that is due and unpaid.

The court shall thereafter promptly certify to the Attorney General the amount of any subsequent payment that the court may receive with respect to, and the nature of any subsequent remission or modification of, a fine concerning which certification has previously been issued.

(b) RESPONSIBILITY FOR COLLECTION.—The Attorney General shall be responsible for collection of an unpaid fine concerning which a certification has been issued as provided in subsection (a). An order of restitution, pursuant to section 3556, does not create any right of action against the United States by the person to whom restitution is ordered to be paid.

§ 3613. Lien provisions for satisfaction of an unpaid fine

(a) LIEN.—A fine imposed pursuant to the provisions of subchapter C of chapter 227 is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b). On application of the person fined, the Attorney General shall—

(1) issue a certificate of release, as described in section 6325 of the Internal Revenue Code, of any lien imposed pursuant to this section, upon his acceptance of a bond described in section 6325(a)(2) of the Internal Revenue Code; or

(2) issue a certificate of discharge, as described in section 6325 of the Internal Revenue Code, of any part of the person's property subject to a lien imposed pursuant to this section, upon his determination that the fair market value of that part of such property remaining subject to and available to satisfy the lien is at least three times the amount of the fine.

(b) Expiration of Lien.—A lien becomes unenforceable and liability to pay a fine expires—

(1) twenty years after the entry of the judgment; or

(2) upon the death of the individual fined.

The period set forth in paragraph (1) may be extended, prior to its expiration, by a written agreement between the person fined and the Attorney General. The running of the period set forth in paragraph (1) is suspended during any interval for which the running of the period of limitations for collection of a tax would be suspended pursuant to section 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I) of the Internal Revenue Code of 1954 (26 U.S.C. 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I)), or section 513 of the Act of October 17, 1940, 54 Stat. 1190.

(c) Application of Other Lien Provisions.—The provisions of sections 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805) and of section 513 of the Act of October 17, 1940, 54 Stat. 1190, apply to a fine and to the lien imposed by subsection (a) as if the liability of the person fined were for an internal revenue tax assessment, except to the extent that the application of such statutes is modified by regulations issued by the Attorney General to accord with differences in the nature of the liabilities. For the purposes of this subsection, references in the preceding sections of the Internal Revenue Code of 1954 to "the Secretary" shall be construed to mean "the Attorney General," and references in those sections to "tax" shall be construed to mean "fine."

(d) Effect of Notice of Lien.—A notice of the lien imposed by subsection (a) shall be considered a notice of lien for taxes payable to the United States for the purposes of any State or local law providing for the filing of a notice of a tax lien. The registration, recording, docketing, or indexing, in accordance with 28 U.S.C. 1962, of the judgment under which a fine is imposed shall be considered for all purposes as the filing prescribed by section 6323(f)(1)(A) of the Internal Revenue Code of 1954 (26 U.S.C. 6323(f)(1)(A)) and by subsection (c).

(e) Alternative Enforcement.—Notwithstanding any other provision of this section, a judgment imposing a fine may be enforced by execution against the property of the person fined in like manner as judgments in civil cases, but in no event shall liability for payment of a fine extend beyond the period specified in subsection (b).

(f) Discharge of Debts Inapplicable.—No discharge of debts pursuant to a bankruptcy proceeding shall render a lien under this section unenforceable or discharge liability to pay a fine.

SUBCHAPTER C—IMPRISONMENT

Sec.
3621. Imprisonment of a convicted person.
3622. Temporary release of a prisoner.
3623. Transfer of a prisoner to state authority.
3624. Release of a prisoner.
3625. Inapplicability of the Administrative Procedure Act.

SUBCHAPTER C—IMPRISONMENT

§ 3621. Imprisonment of a convicted person

(a) COMMITMENT TO CUSTODY OF BUREAU OF PRISONS.—A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

(b) PLACE OF IMPRISONMENT.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

(1) the resources of the facility contemplated;

(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;

(4) any statement by the court that imposed the sentence—

(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

(B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another.

(c) DELIVERY OF ORDER OF COMMITMENT.—When a prisoner, pursuant to a court order, is placed in the custody of a person in charge of a penal or correctional facility, a copy of the order shall be delivered to such person as evidence of this authority to hold the prisoner, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

(d) DELIVERY OF PRISONER FOR COURT APPEARANCES.—The United States Marshal shall, without charge, bring a prisoner into court or return him to a prison facility on order of a court of the United States or on written request of an attorney for the Government.

§ 3622. Temporary release of a prisoner

The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period if such release appears to be consistent with the purpose for which the sentence was imposed and any pertinent policy statement issued by the Sentencing Commission *pursuant to 28 U.S.C. 994(a)(2), if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that a prisoner will honor the trust to be imposed in him, by authorizing him, under prescribed conditions, to—*

(a) visit a designated place for a period not to exceed thirty days, and then return to the same or another facility, for the purpose of—

(1) visiting a relative who is dying;

(2) attending a funeral of a relative;

(3) obtaining medical treatment not otherwise available;

(4) contacting a prospective employer;

(5) establishing or reestablishing family or community ties; or

(6) engaging in any other significant activity consistent with the public interest;

(b) participate in a training or educational program in the community while continuing in official detention at the prison facility; or

(c) work at paid employment in the community while continuing in official detention at the penal or correctional facility if—

(1) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the community; and

(2) the prisoner agrees to pay to the Bureau such costs incident to official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the Treasury to the credit of the appropriation available for such costs at the time such collections are made.

§ 3623. Transfer of a prisoner to state authority

The Director of the Bureau of Prisons shall order that a prisoner who has been charged in an indictment or information with, or convicted of, a State felony, be transferred to an official detention facility within such State prior to his release from a Federal prison facility if—

(1) the transfer has been requested by the Governor or other executive authority of the State;

(2) the State has presented to the Director a certified copy of the indictment, information, or judgment of conviction; and

(3) the Director finds that the transfer would be in the public interest.

If more than one request is presented with respect to a prisoner, the Director shall determine which request should receive preference. The expenses of such transfer shall be borne by the State requesting the transfer.

§ 3624. Release of a prisoner

(a) Date of Release.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of his term of imprisonment, less any time credited toward the service of his sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the

prisoner may be released by the Bureau on the last preceding weekday.

(b) Credit Toward Service of Sentence for Satisfactory Behavior.—A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of his life, shall receive credit toward the service of his sentence, beyond the time served, of thirty-six days at the end of each year of his term of imprisonment, beginning after the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time that it is received. Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted. Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(c) Pre-Release Custody.—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last ten percent of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

(d) Allotment of Clothing, Funds, and Transportation.—Upon the release of a prisoner on the expiration of his term of imprisonment, the Bureau of Prisons shall furnish him with—

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of his conviction, to his bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

(e) Supervision After Release.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment. The term runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release, except that it does not run during any period in which the person is imprisoned, other than during limited intervals as a condition of

probation or supervised release, in connection with a conviction for a Federal, State, or local crime.

§ 3625. Inapplicability of the Administrative Procedure Act

The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter.

CHAPTER 232—MISCELLANEOUS SENTENCING PROVISIONS

Sec.

3661. Use of information for sentencing.
3662. Conviction records.
3663. Order of restitution.
3664. Procedure for issuing order of restitution.
3665. Firearms possessed by convicted felons.
3666. Bribe moneys.
3667. Liquors and related property; definitions.
3668. Remission or mitigation of forfeitures under liquor laws; possession pending trial.
3669. Conveyance carrying liquor.
3670. Disposition of conveyances seized for violation of the Indian liquor laws.
3671. Vessels carrying explosives and steerage passengers.
3672. Duties of Director of Administrative Office of the United States Courts.
3673. Definitions for sentencing provisions.

§ [3577.]*3661.* Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

§ [3578.]*3662.* Conviction records

(a) The Attorney General of the United States is authorized to establish in the Department of Justice a repository for records of convictions and determinations of the validity of such convictions.

(b) Upon the conviction thereafter of a defendant in a court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for an offense punishable in such court by death or imprisonment in excess of one year, or a judicial determination of the validity of such conviction on collateral review, the court shall cause a certified record of the conviction or determination to be made to the repository in such form and containing such information as the Attorney General of the United States shall by regulation prescribe.

(c) Records maintained in the repository shall not be public records. Certified copies thereof—

(1) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(2) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of a State, any political subdivision, or any department, agency, or instrumentality thereof, if a statute of such State requires that, upon the conviction of a defendant in a court of the State or any political subdivision thereof for an offense punishable in such court by death or imprisonment in excess of one year, or a judicial determination of the validity of such conviction on collateral review, the court cause a certified record of the conviction or determination to be made to the repository in such form and containing such information as the Attorney General of the United States shall by regulation prescribe; and

(3) shall be prima facie evidence in any court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof, that the convictions occurred and whether they have been judicially determined to be invalid on collateral review.

(d) The Attorney General of the United States shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing regulations under this section.

§ [3579.] *3663.* Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the Court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than—

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

[(g) If such defendant is placed on probation or paroled under this title, any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation and the Parole Commission may revoke parole if the defendant fails to comply with such order. In determining whether to revoke probation or parole, the court or Parole Commission shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.]

(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation, or modify the term or conditions of a term of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such order. In determining whether to revoke probation, modify the term or conditions of supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

[(h) An order of restitution may be enforced by the United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.]

(h) An order of restitution may be enforced by the United States in the manner provided in sections 3812 and 3813 or in the same manner as a judgment in a civil action, and by the victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

§ [3580.] *3664.* Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

§ [3611.] *3665.* Firearms possessed by convicted felons

A judgment of conviction for tranporting a stolen motor vehicle in interstate or foreign commerce or for committing or attempting to commit a felony in violation of any law of the United States involving the use of threats, force, or violence or perpetrated in whole or in part by the use of firearms, may, in addition to the penalty provided by law for such offense, order the confiscation and disposal of firearms and ammunition found in the possession or under the immediate control of the defendant at the time of his arrest.

The court may direct the delivery of such firearms or ammunition to the law-enforcement agency which apprehended such person, for its use or for any other disposition in its discretion.

§ [3612.] *3666.* Bribe moneys

Moneys received or tendered in evidence in any United States Court, or before any officer thereof, which have been paid to or received by any official as a bribe, shall, after the final disposition of the case, proceeding or investigation, be deposited in the registry of the court to be disposed of in accordance with the order of the court, to be subject, however, to the provisions of section 2042 of Title 28.

§ [3615.] *3667.* Liquors and related property; definitions

All liquor involved in any violation of sections 1261–1265 of this title, the containers of such liquor, and every vehicle or vessel used in the transportation thereof, shall be seized and forfeited and such property or its proceeds disposed of in accordance with the laws relating to seizures, forfeitures, and dispositions of property or proceeds, for violation of the internal-revenue laws.

As used in this section, "vessel" includes every description of watercraft used, or capable of being used, as a means of transportation in water or in water and air; "vehicle" includes animals and every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land or through the air.

§ [3617.] *3668.* Remission or mitigation of forfeitures under liquor laws; possession pending trial

(a) Jurisdiction of court

Whenever, in any proceeding in court for the forfeiture, under the internal-revenue laws, of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquors, such forfeiture is decreed, the court shall have exclusive jurisdiction to remit or mitigate the forfeiture.

(b) Conditions precedent to remission or mitigation

In any such proceeding the court shall not allow the claim of any claimant for remission or mitigation unless and until he proves (1) that he has an interest in such vehicle or aircraft, as owner or otherwise, which he acquired in good faith, (2) that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws of the United States or of any State relating to liquor, and (3) if it appears that the interest asserted by the claimant arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, that, before such claimant acquired his interest, or such other person acquired his right under such contract or agreement, whichever occurred later, the claimant, his officer or agent, was informed in answer to his inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality in which such other person acquired his right under such contract or agreement, of the locality in which such other person then resided, and of each locality in which the claimant has made any other inquiry as to the character or financial standing of such other person, that such other person had no such record or reputation.

(c) Claimants first entitled to delivery

Upon the request of any claimant whose claim for remission or mitigation is allowed and whose interest is first in the order of priority among such claims allowed in such proceeding and is of an amount in excess of, or equal to, the appraised value of such vehicle or aircraft, the court shall order its return to him; and, upon the joint request of any two or more claimants whose claims are allowed and whose interests are not subject to any prior or intervening interests claimed and allowed in such proceedings, and are of a total amount in excess of, or equal to, the appraised value of such vehicle or aircraft, the court shall order its return to such of the joint requesting claimants as is designated in such request. Such return shall be made only upon payment of all expenses incident to the seizure and forfeiture incurred by the United States. In all other cases the court shall order disposition of such vehicle or aircraft as provided in sections 304f–304m of Title 40, and if such disposition be by public sale, payment from the proceeds thereof, after satisfaction of all such expenses, of any such claim in its order of priority among the claims allowed in such proceedings.

(d) Delivery on bond pending trial

In any proceeding in court for the forfeiture under the internal-revenue laws of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquor, the court shall order delivery thereof to any claimant who shall establish his right to the immediate possession thereof, and shall execute, with one or more sureties approved by the court, and deliver to the court, a bond to the United States for the payment of a sum equal to the appraised value of such vehicle or aircraft. Such bond shall be conditioned to return such vehicle or aircraft at the time of the trial and to pay the difference between the appraised value of such vehicle or aircraft as of the time it shall have been so released on bond and the appraised value thereof as of the time of trial; and conditioned further that, if the vehicle or aircraft be not returned at the time of trial, the bond shall stand in lieu of, and be forfeited in the same manner as, such vehicle or aircraft. Notwithstanding this subsection or any other provisions of law relating to the delivery of possession on bond of vehicles or aircraft sought to be forfeited under the internal-revenue laws, the court may, in its discretion and upon good cause shown by the United States, refuse to order such delivery of possession.

§ [3618.] *3669.* Conveyances carrying liquor

Any conveyance, whether used by the owner or another in introducing or attempting to introduce intoxicants into the Indian country, or into other places where the introduction is prohibited by treaty or enactment of Congress, shall be subject to seizure, libel, and forfeiture.

§ [3619.] *3670.* Disposition of conveyances seized for violation of the Indian liquor laws

The provisions of section [3617] *3668* of this title shall apply to any conveyances seized, proceeded against by libel, or forfeited under the provisions of section 3113 or [3618] *3669* of this title for having been used in introducing or attempting to introduce intoxicants into the Indian country or into other places where such introduction is prohibited by treaty or enactment of Congress.

§ [3620.] *3671.* Vessels carrying explosives and steerage passengers

The amount of any fine imposed upon the master of a steamship or other vessel under the provisions of section 2278 of this title shall be a lien upon such vessel, and such vessel may be libeled therefor in the district court of the United States for any district in which such vessel shall arrive or from which it shall depart.

§ [3656.] *3672.* Duties of Director of Administrative Office of the United States Courts

The Director of the Administrative Office of the United States Courts, or his authorized agent, shall investigate the work of the probation officers and make recommendations concerning the same to the respective judges and shall have access to the records of all probation officers.

He shall collect for publication statistical and other information concerning the work of the probation officers.

He shall prescribe record forms and statistics to be kept by the probation officers and shall formulate general rules for the proper conduct of the probation work.

He shall endeavor by all suitable means to promote the efficient administration of the probation system and the enforcement of the probation laws in all United States courts.

He shall, under the supervision and direction of the Judicial Conference of the United States, fix the salaries of probation officers and shall provide for their necessary expenses including clerical service and travel expenses.

He shall incorporate in his annual report a statement concerning the operation of the probation system in such courts.

§3673. Definitions for sentencing provisions

As used in chapters 227 and 229—

(a) "found guilty" includes acceptance by a court of a plea of guilty or nolo contendere;

(b) "commission of an offense" includes the attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense; and

(c) "law enforcement officer" means a public servant authorized by law or by a government agency to engage in or supervise the prevention, detection, investigation, or prosecution of an offense.

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CHAPTER 235—APPEAL

Sec.

3731. Appeal by United States.
3732. Taking of appeal; notice; time—Rule.
3733. Assignment of errors—Rule.
3734. Bill of exceptions abolished—Rule.
3735. Bail on appeal or certiorari—Rule.
3736. Certiorari—Rule.
3737. Record—Rule.
3738. Docketing appeal and record—Rule.
3739. Supervision—Rule.
3740. Argument—Rule.
3741. Harmless error and plain error—Rule.
3742. Review of a sentence.

* * * * * * *

§ 3742. Review of a sentence

(a) Appeal by a Defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); or

(3) is greater than the sentence, if any, specified in a plea agreement under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure, and—

(A) is greater than the sentence specified in the applicable sentencing guideline issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), to the extent that the sentence includes a greater fine or term of imprisonment or term of supervised release than the maximum established in the guideline, or includes a more limited condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the maximum established in the guideline; or

(B) there is no guideline for any offense under the provision of law that the defendant was convicted of violating.

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); or

(3) is less than the sentencie, if any, specified in a plea agreement under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure, and—

(A) is less than the sentence specified in the applicable sentencing guideline issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), to the extent that the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guideline, or includes a less limiting condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the minimum established in the guideline; or

(B) there is no guideline for any offense under the provision of law that the defendant was convicted of violating;

and the Attorney General or the Solicitor General personally approves the filing of the notice of appeal.

(c) Record on Review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(d) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is outside the range of the applicable sentencing guideline, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c).

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous.

(e) Decision and Disposition.—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, it shall—

(A) remand the case for further sentencing proceedings; or

(B) correct the sentence;

(2) is outside the range of the applicable sentencing guideline and is unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and—

(i) remand the case for imposition of a lesser sentence;

(ii) remand the case for further sentencing proceedings; or

(iii) impose a lesser sentence;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and—

(i) remand the case for imposition of a greater sentence;

(ii) remand the case for further sentencing proceedings; or

(iii) impose a greater sentence; or

(3) was not imposed in violation of law or imposed as a result of an incorrect applicaiton of the sentencing guidelines, and is not unreasonable, it shall affirm the sentence.

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PART III—PRISONS AND PRISONERS

Chapter Sec.
301. General provisions 4001
303. Bureau of Prisons 4041
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[1] Heading for chapter editorially supplied.

CHAPTER 301—GENERAL PROVISIONS

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4004. Oaths and acknowledgments.

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§ 4004. Oaths and acknowledgments

The wardens and superintendents, associate wardens and superintendents, chief clerks, [record clerks, and parole officers] *and record clerks*, of Federal penal or correctional institutions, may administer oaths to and take acknowledgments of officers, employees, and inmates of such institutions, but shall not demand or accept any fee or compensation therefor.

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CHAPTER 305—COMMITMENT AND TRANSFER

Sec.
4081. Classification and treatment of prisoners.
4082. Commitment to Attorney General; residential treatment centers, extension of limits of confinement; work furlough.
4083. Penitentiary imprisonment; consent.
[4084. Copy of commitment delivered with prisoner.] *[4084. Repealed.]*
[4085. Transfer for state offense; expense.] *[4085. Repealed.]*
4086. Temporary safe-keeping of Federal offenders by marshals.

§ 4081. Classification and treatment of prisoners

The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions.

§ 4082. Commitment to Attorney General; residential treatment centers; extension of limits of confinement; work furlough

[(a) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.

[(b) The Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise, and whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another.

[(c) The Attorney General may extend the limits of the place of confinement of a prisoner as to whom there is reasonable cause to believe he will honor his trust, by authorizing him, under prescribed conditions, to—

[(1) visit a specifically designated place or places for a period not to exceed thirty days and return to the same or another institution or facility. An extension of limits may be granted to permit a visit to a dying relative, attendance at the funeral of a relative, the obtaining of medical services not otherwise available, the contacting of prospective employers, the establishment or reestablishment of family and community ties or for any other significant reason consistent with the public interest; or

[(2) work at paid employment or participate in a training program in the community on a voluntary basis while continuing as a prisoner of the institution or facility to which he is committed, provided that—

[(i) representatives of local union central bodies or similar labor union organizations are consulted;

[(ii) such paid employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services; and

[(iii) the rates of pay and other conditions of employment will not be less than those paid or provided for work of similar nature in the locality in which the work is to be performed.

A prisoner authorized to work at paid employment in the community under this subsection may be required to pay, and the Attorney General is authorized to collect, such costs incident to the prisoner's confinement as the Attorney General deems appropriate and reasonable. Collections shall be deposited in the Treasury of the United States as miscellaneous receipts.

[(d)] (*a*) The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility designated by the Attorney General, shall be deemed an escapee from the custody of the Attorney General punishable as provided in chapter 35 of this title.

[(e) The authority conferred upon the Attorney General by this section shall extend to all persons committed to the National Training School for Boys.]

[(f)] (*b*) As used in this section—

the term "facility" shall include a residential community treatment center; and

the term "relative" shall mean a spouse, child (including stepchild, adopted child or child as to whom the prisoner, though not a natural parent, has acted in the place of a parent), parent (including a person who, though not a natural parent, has acted in the place of a parent), brother, or sister.

* * * * * * *

[§ 4084. Copy of commitment delivered with prisoner

[Whenever a prisoner is committed to a warden, sheriff or jailer by virtue of a writ, or warrant, a copy thereof shall be delivered to such officer as his authority to hold the prisoner, and the original shall be returned to the proper court or officer, with the officer's return endorsed thereon.

[§ 4085. Transfer for state offense; expense

[(a) whenever any Federal prisoner has been indicted, informed against, or convicted of a felony in a court of record of any State or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon the presentation of a certified copy of such indictment, information or judgment of conviction, cause such person, prior to his release, to be transferred to a penal or correctional institution within such State or District.

[If more than one such request is presented in respect to any prisoner, the Attorney General shall determine which request should receive preference.

[The expense of personnel and transportation incurred shall be chargeable to the appropriation for the "Support of United States prisoners."

[(b) This section shall not limit the authority of the Attorney General to transfer prisoners pursuant to other provisions of law.]

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CHAPTER 306—TRANSFER TO OR FROM FOREIGN COUNTRIES

Sec.
4100. Scope and limitation of chapter.
4101. Definitions.
4102. Authority of the Attorney General.
4103. Applicability of United States laws.
4104. Transfer of offenders on probation.
4105. Transfer of offenders serving sentence of imprisonment.
4106. Transfer of offenders on parole; parole of offenders transferred.
4107. Verification of consent of offender to transfer from the United States.
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4109. Right to counsel, appointment of counsel.
4110. Transfer of juveniles.
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4114. Return of transferred offenders.
4115. Execution of sentences imposing an obligation to make restitution or reparations.

§ 4101. Definitions

As used in this chapter the term—

* * * * * * *

(f) "parole" means any form of release of an offender from imprisonment to the community by a releasing authority prior to the expiration of his sentence, subject to conditions imposed by the releasing authority and to its supervision, *including a term of supervised release pursuant to section 3583;*

(g) "probation" means any form of a sentence [to a penalty of imprisonment the execution of which is suspended and] *under which* the offender is permitted to remain at liberty under supervision and subject to conditions for the breach of which [the suspended] *a* penalty of imprisonment may be ordered executed;

* * * * * * *

§ 4105. Transfer of offenders serving sentence of imprisonment

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(c)(1) The transferred offender shall be entitled to all credits for good time, for labor, or any other credit toward the service of the sentence which had been given by the transferring country for time served as of the time of the transfer. Subsequent to the transfer, the offender shall in addition be entitled to credits [for good time] *toward service of sentence for satisfactory behavior,* computed on the basis of the time remaining to be served at the time of the transfer and at the rate provided in [section 4161] *section 3624(b)* of this title for a sentence of the length of the total sentence imposed and certified by the foreign authorities. These credits shall be combined to provide a release date for the offender pursuant to [section 4164] *section 3624(a)* of this title.

(2) If the country from which the offender is transferred does not give credit for good time, the basis of computing the deduction from the sentence shall be the sentence imposed by the sentencing court and certified to be served upon transfer, at the rate provided in [section 4161] *section 3624(b)* of this title.

[(3) A transferred offender may earn extra good time deductions, as authorized in section 4162 of this title, from the time of transfer.

[(4) All credits toward service of the sentence, other than the credit for time in custody before sentencing, may be forfeited as provided in section 4165 of this title and may be restored by the Attorney General as provided in section 4166 of this title.]

(3) *Credit toward service of sentence may be withheld as provided in section 3624(b) of this title.*

(*4*) Any sentence for an offense against the United States, imposed while the transferred offender is serving the sentence of imprisonment imposed in a foreign country, shall be aggregated with the foreign sentence, in the same manner as if the foreign sentence was one imposed by a United States district court for an offense against the United States.

§ 4106. Transfer of offenders on parole; parole of offenders transferred

(a) Upon the receipt of an offender who is on parole from the authorities of a foreign country, the Attorney General shall assign the offender to the United States [Parole Commission] *Probation System* for supervision.

[(b) The United States Parole Commission and the Chairman of the Commission shall have the same powers and duties with reference to an offender transferred to the United States to serve a sentence of imprisonment or who at the time of transfer is on parole as they have with reference to an offender convicted in a court of the United States except as otherwise provided in this chapter or in the pertinent treaty. Sections 4201 through 4204; 4205 (d), (e), and (h); 4206 through 4216; and 4218 of this title shall be applicable.]

(b) An offender transferred to the United States to serve a sentence of imprisonment shall be released pursuant to section 3624(a) of this title after serving the period of time specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994(a)(1). He shall be released to serve a term of supervised release for any term specified in the applicable guideline. The provisions of section 3742 of this title apply to a sentence to a term of imprisonment under this subsection, and the United States court of appeals for the district in which the offender is imprisoned after transfer to the United States has jurisdiction to review the period of imprisonment as though it had been imposed by the United States district court.

[(c) An offender transferred to the United States to serve a sentence of imprisonment may be released on parole at such time as the Parole Commission may determine.]

* * * * * * *

§ 4108. Verification of consent of offender to transfer to the United States

(a) Prior to the transfer of an offender to the United States, the fact that the offender consents to such transfer and that such consent is voluntary and with full knowledge of the consequences thereof, *including any term of imprisonment or term of supervised release specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994(a)(1),* shall be verified in the country in which the sentence was imposed by a United States magistrate, or by a citizen specifically designated by a judge of the United States as defined in section 451 of title 28, United States Code. The designation of a citizen who is an employee or officer of a department or agency of the United States shall be with the approval of the head of that department or agency.

* * * * * * *

[CHAPTER 309—GOOD TIME ALLOWANCES

[Sec.

[4161. Computation generally.
[4162. Industrial good time.
[4163. Discharge.
[4164. Released prisoner as parolee.
[4165. Forfeiture for offense.
[4166. Restoration of forefeited commutation.]

[§ 4161. Computation generally

[Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:

[Five days for each month, if the sentence is not less than six months and not more than one year.

[Six days for each month, if the sentence is more than one year and less than three years.

[Seven days for each month, if the sentence is not less than three years and less than five years.

[Eight days for each month, if the sentence is not less than five years and less than ten years.

[Ten days for each month, if the sentence is ten years or more.

[When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed.]

[§ 4162. Industrial good time

[A prisoner may, in the discretion of the Attorney General, be allowed a deduction from his sentence of not to exceed three days for each month of actual employment in an industry or camp for the first year or any part thereof, and not to exceed five days for each month of any succeeding year or part thereof.

[In the discretion of the Attorney General such allowance may also be made to a prisoner performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations.

[Such allowance shall be in addition to commutation of time for good conduct, and under the same terms and conditions and without regard to length of sentence.]

[§ 4163. Discharge

[Except as hereinafter provided a prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct. A certificate of such deduction shall be entered on the commitment by the warden or keeper. If such release date falls upon a Saturday, a Sunday, or on a Monday which is a legal holiday at the place of confinement, the prisoner may be released at the discretion of the warden or keeper on the preceding Friday. If such release date falls on a holiday which falls other than on a Saturday, Sunday, or Monday, the prisoner may be released at the discretion of the warden or keeper on the day preceding the holiday.]

[§ 4164. Released prisoner as parolee

[A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days.

[This section shall not prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody.]

[§ 4165. Forfeiture for offense

[If during the term of imprisonment a prisoner commits any offense or violates the rules of the institution, all or any part of his earned good time may be forfeited.]

[§ 4166. Restoration of forfeited commutation

[The Attorney General may restore any forfeited or lost good time or such portion thereof as he deems proper upon recommendation of the Director of the Bureau of Prisons.]

* * * * * * *

[CHAPTER 311—PAROLE

[Sec.
[4201. Definitions.
[4202. Parole Commission created.
[4203. Powers and duties of the Commision.
[4204. Powers and duties of the Chairman.
[4205. Time of eligibility for release on parole.
[4206. Parole determination criteria.

[4207. Information considered.
[4208. Parole determinaton proceeding; time.
[4209. Conditions of parole.
[4210. Jurisdiction of Commission.
[4211. Early termination of parole.
[4212. Aliens.
[4213. Summons to appear or warrant for retaking of parolee.
[4214. Revocation of parole.
[4215. Reconsideration and appeal.
[4216. Young adult offenders.
[4217. Warrants to retake Canal Zone parole violators.
[4218. Applicability of Administrative Procedure Act.]

[§ 4201. Definitions

[As used in this chapter—

[(1) "Commission" means the United States Parole Commission;

[(2) "Commissioner" means any member of the United States Parole Commission;

[(3) "Director" means the Director of the Bureau of Prisons;

[(4) "Eligible prisoner" means any Federal prisoner who is eligible for parole pursuant to this title or any other law including any Federal prisoner whose parole has been revoked and who is not otherwise ineligible for parole;

[(5) "Parolee" means any eligible prisoner who has been released on parole or deemed as if released on parole under section 4164 or section 4205(f); and

[(6) "Rules and regulations" means rules and regulations promulgated by the Commission pursuant to section 4203 and section 553 of title 5, United States Code.]

[§ 4202. Parole Commission created

[There is hereby established, as an independent agency in the Department of Justice, a United States Parole Commission which shall be comprised of nine members appointed by the President, by and with the advice and consent of the Senate. The President shall designate from among the Commissioners one to serve as Chairman. The term of office of a Commissioner shall be six years, except that the term of a person appointed as a Commissioner to fill a vacancy shall expire six years from the date upon which such person was appointed and qualified. Upon the expiration of a term of office of a Commissioner, the Commissioner shall continue to act until a successor has been appointed and qualified, except that no Commissioner may serve in excess of twelve years. Commissioners shall be compensated at the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332).]

[§ 4203. Powers and duties of the Commission

[(a) The Commission shall meet at least quarterly, and by majority vote shall—

[(1) promulgate rules and regulations establishing guidelines for the powers enumerated in subsection (b) of this section and such other rules and regulations as are necessary to carry out a national parole policy and the purposes of this chapter;

[(2) create such regions as are necessary to carry out the provisions of this chapter, but in no event less than five; and

[(3) ratify, revise, or deny any request for regular, supplemental, or deficiency appropriations, prior to the submission of the request to the Office of Management and Budget by the Chairman, which requests shall be separate from those of any other agency of the Department of Justice.

[(b) The Commission, by majority vote, and pursuant to the procedures set out in this chapter, shall have the power to—

[(1) grant or deny an application or recommendation to parole any eligible prisoner;

[(2) impose reasonable conditions on an order granting parole;

[(3) modify or revoke an order paroling any eligible prisoner; and

[(4) request probation officers and other individuals, organizations, and public or private agencies to perform such duties with respect to any parolee as the Commission deems necessary for maintaining proper supervision of and assistance to such parolees; and so as to assure that no probation officers, individuals, organizations, or agencies shall bear excessive caseloads.

[(c) The Commission, by majority vote, and pursuant to rules and regulations—

[(1) may delegate to any Commissioner or commissioners powers enumerated in subsection (b) of this section;

[(2) may delegate to hearing examiners any powers necessary to conduct hearings and proceedings, take sworn testimony, obtain and make a record of pertinent information, make findings of probable cause and issue subpenas for witnesses or evidence in parole revocation proceedings, and recommend disposition of any matters enumerated in subsection (b) of this section, except that any such findings or recommendations shall be based upon the concurrence of not less than two hearing examiners;

[(3) may delegate authority to conduct hearings held pursuant to section 4214 to any officer or employee of the executive or judicial branch of Federal or State government; and

[(4) may review, or may delegate to the National Appeals Board the power to review, any decision made pursuant to subparagraph (1) of this subsection except that any such decision so reviewed must be reaffirmed, modified or reversed within thirty days of the date the decision is rendered, and, in case of such review, the individual to whom the decision applies shall be informed in writing of the Commission's actions with respect thereto and the reasons for such actions.

[(d) Except as otherwise provided by law, any action taken by the Commission pursuant to subsection (a) of this section shall be taken by a majority vote of all individuals currently holding office as members of the Commission which shall maintain and make available for public inspection a record of the final vote of each member on statements of policy and interpretations adopted by it. In so acting, each Commissioner shall have equal responsibility and authority, shall have full access to all information relating to the performance of such duties and responsibilities, and shall have one vote.]

[§ 4204. Powers and duties of the Chairman

[(a) The Chairman shall—

[(1) convene and preside at meetings of the Commission pursuant to section 4203 and such additional meetings of the Commission as the Chairman may call or as may be requested in writing by at least three Commissioners;

[(2) appoint, fix the compensation of, assign, and supervise all personnel employed by the Commission except that—

[(A) the appointment of any hearing examiner shall be subject to approval of the Commission within the first year of such hearing examiner's employment; and

[(B) regional Commissioners shall appoint and supervise such personnel employed regularly and full time in their respective regions as are compensated at a rate up to and including grade 9 of the General Schedule pay rates (5 U.S.C. 5332);

[(3) assign duties among officers and employees of the Commission, including Commissioners, so as to balance the workload and provide for orderly administration;

[(4) direct the preparation of requests for appropriations for the Commission, and the use of funds made available to the Commission;

[(5) designate three Commissioners to serve on the National Appeals Board of whom one shall be so designated to serve as vice chairman of the Commission (who shall act as Chairman of the Commission in the absence or disability of the Chairman or in the event of the vacancy of the Chairmanship), and designate, for each such region established pursuant to section 4203, one Commissioner to serve as regional Commissioner in each such region; except that in each such designation the Chairman shall consider years of service, personal preference and fitness, and no such designation shall take effect unless concurred in by the President, or his designee;

[(6) serve as spokesman for the Commission and report annually to each House of Congress on the activities of the Commission; and

[(7) exercise such other powers and duties and perform such other functions as may be necessary to carry out the purposes of this chapter or as may be provided under any other provision of law.

[(b) The Chairman shall have the power to—

[(1) without regard to section 3648 of the Revised Statutes of the United States (31 U.S.C. 529), enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or nonprofit organization;

[(2) accept voluntary and uncompensated services, notwithstanding the provisions of section 3679 of the Revised Statutes of the United States (31 U.S.C. 665(b));

[(3) procure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code;

[(4) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the parole process;

[(5) carry out programs of research concerning the parole process to develop classification systems which describe types of offenders, and to develop theories and practices which can be applied to the different types of offenders;

[(6) publish data concerning the parole process;

[(7) devise and conduct, in various geographical locations, seminars, workshops and training programs providing continuing studies and instruction for personnel of Federal, State and local agencies and private and public organizations working with parolees and connected with the parole process; and

[(8) utilize the services, equipment, personnel, information, facilities, and instrumentalities with or without reimbursement therefor of other Federal, State, local, and private agencies with their consent.

[(c) In carrying out his functions under this section, the Chairman shall be governed by the national parole policies promulgated by the Commission.]

[§4205. Time of eligibility for release on parole

[(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

[(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

[(c) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (d) of this section. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) place the offender on probation as authorized by section 3651; or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from the date of original commitment under this section.

[(d) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsections (a) or (b) of this section, the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the Commission a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The Commission may make such other investigation as it may deem necessary.

[(e) Upon request of the Commission, it shall be the duty of the various probation officers and government bureaus and agencies to furnish the Commission information available to such officer, bureau, or agency, concerning any eligible prisoner or parolee and whenever not incompatible with the public interest, their views and recommendation with respect to any matter within the jurisdiction of the Commission.

[(f) Any prisoner sentenced to imprisonment for a term or terms of not less than six months but not more than one year shall be released at the expiration of such sentence less good time deductions provided by law, unless the court which imposed sentence, shall, at the time of sentencing, provide for the prisoner's release as if on parole after service of one-third of such term or terms notwithstanding the provisions of section 4164. This subsection shall not prevent delivery of any person released on parole to the authorities of any State otherwise entitled to his custody.

[(g) At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served. The court shall have jurisdiction to act upon the application at any time and no hearing shall be required.

[(h) Nothing in this chapter shall be construed to provide that any prisoner shall be eligible for release on parole if such prisoner is ineligible for such release under any other provision of law.]

[§ 4206. Parole determination criteria

[(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

[(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

[(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

[(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

[(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: *Provided*, That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

[(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however*, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.]

[§ 4207. Information considered

[In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

[(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

[(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

[(3) presentence investigation reports;

[(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and

[(5) reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.]

[§ 4208. Parole determination proceeding; time

[(a) In making a determination under this chapter (relating to parole) the Commission shall conduct a parole determination proceeding unless it determines on the basis of the prisoner's record that the prisoner will be released on parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsections (a) and (b)(1) of section 4205 shall be held not later than thirty days before the date of such eligibility for parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsection (b)(2) of section 4205 or released on parole and whose parole has been revoked shall be held not later than one hundred and twenty days following such prisoner's imprisonment or reimprisonment in a Federal institution, as the case may be. An eligible prisoner may knowingly and intelligently waive any proceeding.

[(b) At least thirty days prior to any parole determination proceeding, the prisoner shall be provided with (1) written notice of the time and place of the proceeding, and (2) reasonable access to a report or other document to be used by the Commission in making its determination. A prisoner may waive such notice, except that if notice is not waived the proceeding shall be held during the next regularly scheduled proceedings by the Commission at the institution in which the prisoner is confined.

[(c) Subparagraph (2) of subsection (b) shall not apply to—

[(1) diagnostic opinions which, if made known to the eligible prisoner, could lead to a serious disruption of his institutional program;

[(2) any document which reveals sources of information obtained upon a promise of confidentiality; or

[(3) any other information which, if disclosed, might result in harm, physical or otherwise, to any person.

[(If any document is deemed by either the Commission, the Bureau of Prisons, or any other agency to fall within the exclusionary provisions of subparagraphs (1), (2), or (3) of this subsection, then it shall become the duty of the Commission, the Bureau, or such other agency, as the case may be, to summarize the basic contents of the material withheld, bearing in mind the need for confidentiality or the impact on the inmate, or both, and furnish such summary to the inmate.

[(d)(1) During the period prior to the parole determination proceeding as provided in subsection (b) of this section, a prisoner may consult, as provided by the director, with a representative as referred to in subparagraph (2) of this subsection, and by mail or otherwise with any person concerning such proceeding.

[(2) The prisoner shall, if he chooses, be represented at the parole determination proceeding by a representative who qualifies under rules and regulations promulgated by the Commission. Such rules shall not exclude attorneys as a class.

[(e) The prisoner shall be allowed to appear and testify on his own behalf at the parole determination proceeding.

[(f) A full and complete record of every proceeding shall be retained by the Commission. Upon request, the Commission shall make available to any eligible prisoner such record as the Commission may retain of the proceeding.

[(g) If parole is denied, a personal conference to explain the reasons for such denial shall be held, if feasible, between the prisoner and the Commissioners or examiners conducting the proceeding at the conclusion of the proceeding. When feasible, the conference shall include advice to the prisoner as to what steps may be taken to enhance his chance of being released at a subsequent proceeding.

[(h) In any case in which release on parole is not granted, subsequent parole determination proceedings shall be held no less frequently than:

[(1) eighteen months in the case of a prisoner with a term or terms of more than one year but less than seven years; and

[(2) twenty-four months in the case of a prisoner with a term or terms of seven years or longer.]

[§ 4209. Conditions of parole

[(a) In every case, the Commission shall impose as a condition of parole that the parolee not commit another Federal, State, or local crime. The Commission may impose or modify other conditions of parole to the extent that such conditions are reasonably related to—

[(1) the nature and circumstances of the offense; and

[(2) the history and characteristics of the parolee;

and may provide for such supervision and other limitations as are reasonable to protect the public welfare.

[(b) The conditions of parole should be sufficiently specific to serve as a guide to supervision and conduct, and upon release on parole the parolee shall be given a certificate setting forth the conditions of his parole. An effort shall be made to make certain that the parolee understands the conditions of his parole.

[(c) Release on parole or release as if on parole may as a condition of such release require—

[(1) a parolee to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of such parole;

[(2) a parolee, who is an addict within the meaning of section 4251(a), or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201), to participate in the community supervision programs authorized by section 4255 for all or part of the period of parole.

A parolee residing in a residential community treatment center pursuant to subparagraph (1) or (2) of this subsection, may be required to pay such costs incident to residence as the Commission deems appropriate.

[(d)(1) The Commission may modify conditions of parole pursuant to this section on its own motion, or on the motion of a United States probation officer supervising a parolee: *Provided,* That the parolee receives notice of such action and has ten days after receipt of such notice to express his views on the proposed modification. Following such ten-day period, the Commission shall have twenty-one days, exclusive of holidays, to act upon such motion or application.

[(2) A parolee may petition the Commission on his own behalf for a modification of conditions pursuant to this section.

[(3) The provisions of this subsection shall not apply to modifications of parole conditions pursuant to a revocation proceeding under section 4214.]

[§ 4210. Jurisdiction of Commission

[(a) A parolee shall remain in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which such parolee was sentenced.

[(b) Except as otherwise provided in this section, the jurisdiction of the Commission over the parolee shall terminate no later than the date of the expiration of the maximum term or terms for which he was sentenced, except that—

[(1) such jurisdiction shall terminate at an earlier date to the extent provided under section 4164 (relating to mandatory release) or section 4211 (relating to early termination of parole supervision), and

[(2) in the case of a parolee who has been convicted of a Federal, State, or local crime committed subsequent to his release on parole, and such crime is punishable by a term of imprisonment, detention or incarceration in any penal facility, the Commission shall determine, in accordance with the provisions of section 4214 (b) or (c), whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense, but in no case shall such service together with such time as the parolee has previously served in connection with the offense for which he was paroled, be longer than the maximum term for which he was sentenced in connection with such offense.

[(c) In the case of any parolee found to have intentionally refused or failed to respond to any reasonable request, order, summons, or warrant of the Commission or any member or agent thereof, the jurisdiction of the Commission may be extended for the period during which the parolee so refused or failed to respond.

[(d) The parole of any parolee shall run concurrently with the period of parole or probation under any other Federal, State, or local sentence.

[(e) The parole of any prisoner sentenced before June 29, 1932, shall be for the remainder of the term or terms specified in his sentence, less good time allowances provided by law.

[(f) Upon the termination of the jurisdiction of the Commission over any parolee, the Commission shall issue a certificate of discharge to such parolee and to such other agencies as it may determine.]

[§ 4211. Early termination of parole

[(a) Upon its own motion or upon request of the parolee, the Commission may terminate supervision over a parolee prior to the termination of jurisdiction under section 4210.

[(b) Two years after each parolee's release on parole, and at least annually thereafter, the Commission shall review the status of the parolee to determine the need for continued supervision. In calculating such two-year period there shall not be included any period of release on parole prior to the most recent such release, nor any period served in confinement on any other sentence.

[(c)(1) Five years after each parolee's release on parole, the Commission shall terminate supervision over such parolee unless it is determined, after a hearing conducted in accordance with the procedures prescribed in section 4214(a)(2), that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law.

[(2) If supervision is not terminated under subparagraph (1) of this subsection the parolee may request a hearing annually thereafter, and a hearing, with procedures as provided in subparagraph

(1) of this subsection shall be conducted with respect to such termination of supervision not less frequently than biennially.

[(3) In calculating the five-year period referred to in subparagraph (1), there shall not be included any period of release on parole prior to the most recent such release, nor any period served in confinement on any other sentence.]

[§ 4212. Aliens

[When an alien prisoner subject to deportation becomes eligible for parole, the Commission may authorize the release of such prisoner on condition that such person be deported and remain outside the United States.

[Such prisoner when his parole becomes effective, shall be delivered to the duly authorized immigration official for deportation.]

[§ 4213. Summons to appear or warrant for retaking of parolee

[(a) If any parolee is alleged to have violated his parole, the Commission may—

[(1) summon such parolee to appear at a hearing conducted pursuant to section 4214; or

[(2) issue a warrant and retake the parolee as provided in this section.

[(b) Any summons or warrant issued under this section shall be issued by the Commission as soon as practicable after discovery of the alleged violation, except when delay is deemed necessary. Imprisonment in an institution shall not be deemed grounds for delay of such issuance, except that, in the case of any parolee charged with a criminal offense, issuance of a summons or warrant may be suspended pending disposition of the charge.

[(c) Any summons or warrant issued pursuant to this section shall provide the parolee with written notice of—

[(1) the conditions of parole he is alleged to have violated as provided under section 4209;

[(2) his rights under this chapter; and

[(3) the possible action which may be taken by the Commission.

[(d) Any officer of any Federal penal or correctional institution, or any Federal officer authorized to serve criminal process within the United States, to whom a warrant issued under this section is delivered, shall execute such warrant by taking such parolee and returning him to the custody of the regional commissioner, or to the custody of the Attorney General, if the Commission shall so direct.]

[§ 4214. Revocation of parole

[(a)(1) Except as provided in subsections (b) and (c), any alleged parole violator summoned or retaken under section 4213 shall be accorded the opportunity to have—

[(A) a preliminary hearing at or reasonably near the place of the alleged parole violation or arrest, without unnecessary delay, to determine if there is probable cause to believe that he has violated a condition of his parole; and upon a finding of probable cause a digest shall be prepared by the Commission setting forth in writing the factors considered and the reasons for the decision, a copy of which shall be given to the parolee within a reasonable period of time; except that after a finding of probable cause the Commission may restore any parolee to parole supervision if:

[(i) continuation of revocation proceedings is not warranted; or

[(ii) incarceration of the parolee pending further revocation proceedings is not warranted by the alleged frequency or seriousness of such violation or violations;

[(iii) the parolee is not likely to fail to appear for further proceedings; and

[(iv) the parolee does not constitute a danger to himself or others.

[(B) Upon a finding of probable cause under subparagraph (1)(A), a revocation hearing at or reasonably near the place of the alleged parole violation or arrest within sixty days of such determination of probable cause except that a revocation hearing may be held at the same time and place set for the preliminary hearing.

[(2) Hearings held pursuant to subparagraph (1) of this subsection shall be conducted by the Commission in accordance with the following procedures:

[(A) notice to the parolee of the conditions of parole alleged to have been violated, and the time, place, and purposes of the scheduled hearing;

[(B) opportunity for the parolee to be represented by an attorney (retained by the parolee, or if he is financially unable to retain counsel, counsel shall be provided pursuant to section 3006A) or, if he so chooses, a representative as provided by rules and regulations, unless the parolee knowingly and intelligently waives such representation;

[(C) opportunity for the parolee to appear and testify, and present witnesses and relevant evidence on his own behalf; and

[(D) opportunity for the parolee to be apprised of the evidence against him and, if he so requests, to confront and cross-examine adverse witnesses, unless the Commission specifically finds substantial reason for not so allowing.

For the purposes of subparagraph (1) of this subsection, the Commission may subpena witnesses and evidence, and pay witness fees as established for the courts of the United States. If a person refuses to obey such a subpena, the Commission may petition a court of the United States for the judicial district in which such parole proceeding is being conducted, or in which such person may be found, to request such person to attend, testify, and produce evidence. The court may issue an order requiring such person to appear before the Commission, when the court finds such information, thing, or testimony directly related to a matter with respect to which the Commission is empowered to make a determination under this section. Failure to obey such an order is punishable by such court as a contempt. All process in such a case may be served in the judicial district in which such a parole proceeding is being conducted, or in which such person may be found.

[(b)(1) Conviction for a Federal, State, or local crime committed subsequent to release on parole shall constitute probable cause for purposes of subsection (a) of this section. In cases in which a parolee has been convicted of such a crime and is serving a new sentence in an institution, a parole revocation warrant or summons issued pursuant to section 4213 may be placed against him as a detainer. Such detainer shall be reviewed by the Commission within one hundred and eighty days of notification to the Commission of placement. The parolee shall receive notice of the pending review, have an opportunity to submit a written application containing information relative to the disposition of the detainer, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section to assist him in the preparation of such application.

[(2) If the Commission determines that additional information is needed to review a detainer, a dispositional hearing may be held at the institution where the parolee is confined. The parolee shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section.

[(3) Following the disposition review, the Commission may:

[(A) let the detainer stand; or

[(B) withdraw the detainer.

[(c) Any alleged parole violator who is summoned or retaken by warrant under section 4213 who knowingly and intelligently waives his right to a hearing under subsection (a) of this section, or who knowingly and intelligently admits violation at a preliminary hearing held pursuant to subsection (a)(1)(A) of this section, or who is retaken pursuant to subsection (b) of this section, shall receive a revocation hearing within ninety days of the date of retaking. The Commission may conduct such hearing at the institution to which he has been returned, and the alleged parole violator shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel or another representative as provided in subsection (a)(2)(B) of this section.

[(d) Whenever a parolee is summoned or retaken pursuant to section 4213, and the Commission finds pursuant to the procedures of this section and by a preponderance of the evidence that the parolee has violated a condition of his parole the Commission may take any of the following actions:

[(1) restore the parolee to supervision;

[(2) reprimand the parolee;

[(3) modify the parolee's conditions of the parole;

[(4) refer the parolee to a residential community treatment center for all or part of the remainder of his original sentence; or

[(5) formally revoke parole or release as if on parole pursuant to this title.

The Commission may take any such action provided it has taken into consideration whether or not the parolee has been convicted of any Federal, State, or local crime subsequent to his release on parole, and the seriousness thereof, or whether such action is warranted by the frequency or seriousness of the parolee's violation of any other condition or conditions of his parole.

[(e) The Commission shall furnish the parolee with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the revocation hearing. If parole is revoked, a digest shall be prepared by the Commission setting forth in writing the factors considered and reasons for such action, a copy of which shall be given to the parolee.]

[§ 4215. Reconsideration and appeal

[(a) Whenever parole release is denied under section 4206, parole conditions are imposed or modified under section 4209, parole discharge is denied under section 4211(c), or parole is modified or revoked under section 4214, the individual to whom any such decision applies may have the decision reconsidered by submitting a written application to the regional commissioner not later than thirty days following the date on which the decision is rendered. The regional commissioner, upon receipt of such application, must act pursuant to rules and regulations within thirty days to reaffirm, modify, or reverse his original decision and shall inform the applicant in writing of the decision and the reasons therefor.

[(b) Any decision made pursuant to subsection (a) of this section which is adverse to the applicant for reconsideration may be appealed by such individual to the National Appeals Board by submitting a written notice of appeal not later than thirty days following the date on which such decision is rendered. The National Appeals Board, upon receipt of the appellant's papers, must act pursuant to rules and regulations within sixty days to reaffirm, modify, or reverse the decision and shall inform the appellant in writing of the decision and the reasons therefor.

[(c) The National Appeals Board may review any decision of a regional commissioner upon the written request of the Attorney General filed not later than thirty days following the decision and, by majority vote, shall reaffirm, modify, or reverse the decision within sixty days of the receipt of the Attorney General's request. The Board shall inform the Attorney General and the individual to whom the decision applies in writing of its decision and the reasons therefor.]

[§ 4216. Young adult offenders

[In the case of a defendant who has attained his twenty-second birthday but has not attained his twenty-sixth birthday at the time of conviction, if, after taking into consideration the previous record of the defendant as to delinquency or criminal experience, his social background, capabilities, mental and physical health, and such other factors as may be considered pertinent, the court finds that there are reasonable grounds to believe that the defendant will benefit from the treatment provided under the Federal Youth Corrections Act (18 U.S.C., chap. 402) sentence may be imposed pursuant to the provisions of such Act.]

[§ 4217. Warrants to retake Canal Zone parole violators

[An officer of a Federal penal or correctional institution, or a Federal officer authorized to serve criminal process within the United States, to whom a warrant issued by the Governor of the Canal Zone for the retaking of a parole violator is delivered, shall execute the warrant by taking the prisoner and holding him for delivery to a representative of the Governor of the Canal Zone for return to the Canal Zone.]

[§ 4218. Applicability of Administrative Procedure Act

[(a) For purposes of the provisions of chapter 5 of title 5, United States Code, other than sections 554, 555, 556, and 557, the Commission is an "agency" as defined in such chapter.

[(b) For purposes of subsection (a) of this section, section 553(b)(3)(A) of title 5, United States Code, relating to rulemaking, shall be deemed not to include the phrase "general statements of policy".

[(c) To the extent that actions of the Commission pursuant to section 4203(a)(1) are not in accord with the provisions of section 553 of title 5, United States Code, they shall be reviewable in accordance with the provisions of sections 701 through 706 of title 5, United States Code.

[(d) Actions of the Commission pursuant to paragraphs (1), (2), and (3) of section 4203(b) shall be considered actions committed to agency discretion for purposes of section 701(a)(2) of title 5, United States Code.]

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[CHAPTER 314—NARCOTIC ADDICTS

[Sec.
[4251. Definitions.
[4252. Examination.
[4253. Commitment.
[4254. Conditional release.
[4255. Supervision in the community.]

[§ 4251. Definitions.

[As used in this chapter—

[(a) "Addict" means any individual who habitually uses any narcotic drug as defined in section 102(16) of the Controlled Substances Act so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such narcotic drugs as to have lost the power of self-control with reference to his addiction.

[(b) "Crime of violence" includes voluntary manslaughter, murder, rape, mayhem, kidnaping, robbery, burglary or housebreaking in the nighttime, extortion accompanied by threats of violence, assault with a dangerous weapon or assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable as a felony, or an attempt or conspiracy to commit any of the foregoing offenses.

[(c) "Treatment" includes confinement and treatment in an institution and under supervised aftercare in the community and includes, but is not limited to, medical, educational, social, psychological, and vocational services, corrective and preventive guidance and training, and other rehabilitative services designed to protect the public and benefit the addict by eliminating his dependence on addicting drugs, or by controlling his dependence, and his susceptibility to addiction.

[(d) "Felony" includes any offense in violation of a law of the United States classified as a felony under section 1 of title 18 of the United States Code, and further includes any offense in violation of a law of any State, any possession or territory of the United States, the District of Columbia, the Canal Zone, or the Commonwealth of Puerto Rico, which at the time of the offense was classified as a felony by the law of the place were that offense was committed.

[(e) "Conviction" and "convicted" mean the final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere, and do not include a final judgment which has been expunged by pardon, reversed, set aside, or otherwise rendered nugatory.

[(f) "Eligible offender" means any individual who is convicted of an offense against the United States, but does not include—

[(1) an offender who is convicted of a crime of violence.

[(2) an offender who is convicted of unlawfully importing or selling or conspiring to import or sell a narcotic drug, unless the court determines that such sale was for the primary purpose of enabling the offender to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug.

[(3) an offender against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served: *Provided*, That an offender on probation, parole, or mandatory release shall be included if the authority authorized to require his return to custody consents to his commitment.

[(4) an offender who has been convicted of a felony on two or more prior occasions.

[(5) an offender who has been committed under title I of the Narcotic Addict Rehabilitation Act of 1966, under this chapter, under the District of Columbia Code, or under any State proceeding because of narcotic addiction on three or more occasions.]

[§ 4252. Examination

[If the court believes that an eligible offender is an addict, it may place him in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment. The Attorney General shall report to the court within thirty days; or any additional period granted by the court, the results of such examination and make any recommendations he deems desirable. An offender shall receive full credit toward the service of his sentence for any time spent in custody for an examination.]

[§ 4253. Commitment

[(a) Following the examination provided for in section 4252, if the court determines that an eligible offender is an addict and is likely to be rehabilitated through treatment, it shall commit him to the custody of the Attorney General for treatment under this chapter, except that no offender shall be committed under this chapter if the Attorney General certifies that adequate facilities or personnel for treatment are unavailable. Such commitment shall be for an indeterminate period of time not to exceed ten years, but in no event shall it exceed the maximum sentence that could otherwise have been imposed.

[(b) If, following the examination provided for in section 4252, the court determines that an eligible offender is not an addict, or is an addict not likely to be rehabilitated through treatment, it shall impose such other sentence as may be authorized or required by law.]

[§ 4254. Conditional release

[An offender committed under section 4253(a) may not be conditionally released until he has been treated for six months following such commitment in an institution maintained or approved by the Attorney General for treatment. The Attorney General may then or at any time thereafter report to the Board of Parole whether the offender should be conditionally released under supervision. After receipt of the Attorney General's report, and certification from the Surgeon General of the Public Health Service that the offender has made sufficient progress to warrant his conditional release under supervision, the Board may in its discretion order such a release. In determining suitability for release, the Board may make any investigation it deems necessary. If the Board does not conditionally release the offender, or if a conditional release is revoked, the Board may thereafter grant a release on receipt of a further report from the Attorney General.]

[§ 4255. Supervision in the community

[An offender who has been conditionally released shall be under the jurisdiction of the United States Parole Commission as if on parole, pursuant to chapter 311 of this title.

[The Director of the Administrative Office of the United States Courts may contract with any appropriate public or private agency or any person for supervisory aftercare of an offender. The Director may negotiate and award such contracts without regard to section 3709 of the Revised Statutes (41 U.S.C. 5).]

CHAPTER 315—DISCHARGE AND RELEASE PAYMENTS

Sec.

[4281. Discharge from prison.] *[4281. Repealed.]*
4282. Arrested but unconvicted persons.
[4283. Probation.] *[4283. Repealed.]*
[4284. Advances for rehabilitation.] *[4284. Repealed.]*
4285. Persons released pending further judicial proceedings.

[§ 4281. Discharge from prison

[A person convicted under the laws of the United States shall, upon discharge from imprisonment, or release on parole, be furnished with transportation to the place of conviction or bona fide residence within the United States at the time of his commitment or to such place within the United States as may be authorized by the Attorney General.

[He shall also be furnished with such suitable clothing as may be authorized by the Attorney General, and, in the discretion of the Attorney General, an amount of money not to exceed $100.]

§ 4282. Arrested but unconvicted persons

On the release from custody of a person arrested on a charge of violating any law of the United States or of the Territory of Alaska, but not indicted nor informed against, or indicted or informed against but not convicted, and not admitted to bail, or a person held as a material witness and unable to make bail, the court in its discretion may direct the United States marshal for the district wherein he is released, pursuant to regulations promulgated by the Attorney General, to furnish the person so released with transportation and subsistence to the place of his arrest, or, at his election, to the place of his bond fide residence if such cost is not greater than to the place of arrest.

[§ 4283. Probation

[A court of the United States when placing a defendant on probation, may direct the United States marshal to furnish the defendant with transportation to the place to which the defendant is required to proceed under the terms of his probation and, in addition, may also direct the marshal to furnish the defendant with an amount of money, not to exceed $30, for subsistence expense to his destination. In such event, such expenses shall be paid by the marshal.]

[§ 4284. Advances for rehabilitation

[(a) The Attorney General, under such regulations as he prescribes, acting for himself or through such officers and employees as he designates, may use so much of the trust funds designated as "Commissary Funds, Federal Prisons" (31 U.S.C. 725s(22)), as may be surplus to other needs of the trust, to provide advances to prisoners at the time of their release, as an aid to their rehabilitation.

[(b) An advance made hereunder shall in no instance exceed $150 except with the specific approval of the Attorney General, and shall in every case be secured by the personal note of the prisoner conditioned to make repayment monthly when employed, or otherwise possessed of funds, with interest at a rate not to exceed 6 per centum per annum and subject to an agreement on the part of the prisoner that the funds so advanced shall be expended only for the purposes designated in the loan agreement. Repayments of principal and interest shall be credited to the trust fund from which the advance was made. Any unpaid principal or interest on said note shall be considered as a debt due the United States.]

§ 4285. Persons released pending further judicial proceedings

Any judge or magistrate of the United States, when ordering a person released under chapter 207 on a condition of his subsequent appearance before that court, any division of that court, or any court of the United States in another judicial district in which criminal proceedings are pending, may, when the interests of justice would be served thereby and the United States judge or magistrate is satisfied, after appropriate inquiry, that the defendant is financially unable to provide the necessary transportation to appear before the required court on his own, direct the United States marshal to arrange for that person's means of noncustodial transportation or furnish the fare for such transportation to the place where his appearance is required, and in addition may direct the United States marshal to furnish that person with an amount of money for subsistence expenses to his destination, not to exceed the amount authorized as a per diem allowance for travel under section 5702(a) of title 5, United States Code. When so ordered, such expenses shall be paid by the marshal out of funds authorized by the Attorney General for such expenses.

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CHAPTER 317—INSTITUTIONS FOR WOMEN

Sec.
4321. Board of Advisers.

§ 4321. Board of Advisers

Four citizens of the United States of prominence and distinction, appointed by the President to serve without compensation, for terms of four years, together with the Attorney General of the United States, the Director of the Bureau of Prisons and the warden of the Federal Reformatory for Women, shall constitute a Board of Advisers of said Federal Reformatory for Women, which shall recommend ways and means for the discipline and training of the inmates, to fit them for suitable employment upon their [parole or] discharge.

Any person chosen to fill a vacancy shall be appointed only for the unexpired term of the citizen whom he shall succeed.

* * * * * * *

CHAPTER 319—NATIONAL INSTITUTE OF CORRECTIONS

Sec.
4351. Establishment; Advisory Board; appointment of members; compensation; officers; committees; delegation of powers; Director, appointment and powers.[1]
4352. Authority of Institute; report to President and Congress; time; records of recipients; access; scope of section.[1]
4353. Authorization of appropriations.[1]

[1] Section catchlines in analysis editorially supplied.

§ 4351. Establishment; Advisory Board; appointment of members; compensation; officers; committees; delegation of powers; Director, appointment and powers [1]

(a) There is hereby established within the Bureau of Prisons a National Institute of Corrections.

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[1] Section catchline editorially supplied.

(b) The overall policy and operations of the National Institute of Corrections shall be under the supervision of an Advisory Board. The Board shall consist of sixteen members. The following six individuals shall serve as members of the Commission ex officio: the Director of the Federal Bureau of Prisons or his designee, the Administrator of the Law Enforcement Assistance Administration or his designee, Chairman of the United States [Parole Board] *Sentencing Commission* or his designee, the Director of the Federal Judicial Center or his designee, the Associate Administrator for the Office of Juvenile Justice and Delinquency Prevention or his designee, and the Assistant Secretary for Human Development of the Department of Health, Education, and Welfare or his designee.

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PART IV—CORRECTION OF YOUTHFUL OFFENDERS

Chapter .... Sec.
401. General provisions 5001
[402. Federal Youth Corrections act .... 5005.] *[402. Repealed.]*
403. Juvenile delinquency 5031

CHAPTER 401—GENERAL PROVISIONS

Sec.
5001. Surrender to State authorities; expenses.
5002. Advisory Corrections Council.
5003. Custody of State offenders.

* * * * * * *

§ 5002. Advisory Corrections Council

There is hereby created an Advisory Corrections Council, composed of one United States circuit judge and two United States district judges designated from time to time by the Chief Justice of the United States, of one member, who shall be Chairman, designated by the Attorney General, and, ex officio, of the Chairman of the [Board of Parole, the Chairman of the Youth Division,] *United States Sentencing Commission,* the Director of the Bureau of Prisons, and the Chief of Probation of the Administrative Office of the United States Courts. The Council shall hold stated meetings to consider problems of treatment and correction of all offenders against the United States and shall make such recommendations to the Congress, the President, the Judicial Conference of the United States, and other appropriate officials as may improve the administration of criminal justice and assure the coordination and integration of policies respecting the disposition, treatment, and correction of all persons convicted of offenses against the United States. It shall also consider measures to promote the prevention of crime and delinquency, suggest appropriate studies in this connection to be undertaken by agencies both public and private. The members of the Council shall serve without compensation but necessary travel and subsistence expenses as authorized by law shall be paid from available appropriations of the Department of Justice.

[CHAPTER 402—FEDERAL YOUTH CORRECTIONS ACT

[Sec.
[5005. Youth correction decisions.
[5006. Definitions.
[[5007 to 5009. Repealed.]
[5010. Sentence.
[5011. Treatment.
[5012. Certificate as to availability of facilities.
[5013. Provision of facilities.
[5014. Classification studies and reports.
[5015. Powers of Director as to placement of youth offenders.
[5016. Reports concerning offenders.
[5017. Release of youth offenders.
[5018. Revocation of Commission orders.
[5019. Supervision of released youth offenders.
[5020. Apprehension of released offenders.[1]
[5021. Certificate setting aside conviction.
[5022. Applicable date.
[5023. Relationship to Probation and Juvenile Delinquency Acts.
[5024. Where applicable.
[5025. Applicability to the District of Columbia.
[5026. Parole of other offenders not affected.

[[1] So in original. Item does not conform to section catchline.

[§ 5005. Youth correction decisions

[The Commission and, where appropriate, its authorized representatives as provided in section 4203(c), may grant or deny any application or recommendation for conditional release, or modify or revoke any order of conditional release, of any person sentenced pursuant to this chapter, and perform such other duties and responsibilities as may be required by law. Except as otherwise provided, decisions of the Commission shall be made in accordance with the procedures set out in chapter 311 of this title.]

[§ 5006. Definitions

[As used in this chapter—

[(a) "Commission" means the United States Parole Commission;

[(b) "Bureau" means the Bureau of Prisons;

[(c) "Director" means the Director of the Bureau of Prisons;

[(d) "youth offender" means a person under the age of twenty-two years at the time of conviction;

[(e) "committed youth offender" is one committed for treatment hereunder to the custody of the Attorney General pursuant to sections 5010(b) and 5010(c) of this chapter;

[(f) "treatment" means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders; and

[(g) "conviction" means the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere.]

[[§§ 5007 to 5009. Repealed. Pub. L. 94-233, § 5, Mar. 15, 1976, 90 Stat. 231]

[§ 5010. Sentence

[(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

[(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter; or

[(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter.

[(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

[(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Commission shall report to the court its findings.]

[§ 5011. Treatment

[Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment. The Director shall from time to time designate, set aside, and adapt institutions and agencies under the control of the Department of Justice for treatment. Insofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment.]

[§ 5012. Certificate as to availability of facilities.

[No youth offender shall be committed to the Attorney General under this chapter until the Director shall certify that proper and adequate treatment facilities and personnel have been provided.]

[§ 5013. Provision of facilities.

[The Director may contract with any appropriate public or private agency not under his control for the custody, care, subsistence, education, treatment, and training of committed youth offenders the cost of which may be paid from the appropriation for "Support of United States Prisoners".]

[§ 5014. Classification studies and reports.

[The Director shall provide classification centers and agencies. Every committed youth offender shall first be sent to a classification center or agency. The classification center or agency shall make a complete study of each committed youth offender, including a mental and physical examination, to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to his delinquency. In the absense of exceptional circumstances, such study shall be completed within a period of thirty days. The agency shall promptly forward to the Director and to the Commission a report of its findings with respect to the youth offender and its recommendations as to his treatment. As soon as practicable after commitment, the youth offender shall receive a parole interview.]

[§ 5015. Powers of Director as to placement of youth offenders.

[(a) On receipt of the report and recommendations from the classification agency the Director may—

[(1) recommend to the Commission that the committed youth offender be released conditionally under supervision; or

[(2) allocate and direct the transfer of the committed youth offender to an agency or institution for treatment, or

[(3) order the committed youth offender confined and afforded treatment under such conditions as he believes best designed for the protection of the public.

[(b) The Director may transfer at any time a committed youth offender from one agency or institution to any other agency or institution.]

[§ 5016. Reports concerning offenders

[The Director shall cause periodic examinations and reexaminations to be made of all committed youth offenders and shall report to the Commission as to each such offender as the Commision may require. United States probation officers and supervisory agents shall likewise report to the Commission respecting youth offenders under their supervision as the Commission may direct.]

[§ 5017. Release of youth offenders

[(a) The Commission may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender in accordance with the provisions of section 4206 of this title. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Commission.

[(b) The Commission may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.

[(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

[(d) A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction.

[(e) Commutation of sentence authorized by any Act of Congress shall not be granted as a matter of right to committed youth offenders but only in accordance with rules prescribed by the Director with the approval of the Commission.]

[§ 5018. Revocation of Commission orders

[The Commission may revoke or modify any of its previous orders respecting a committed youth offender except an order of unconditional discharge.]

[§ 5019. Supervision of released youth offenders

[Committed youth offenders permitted to remain at liberty under supervision or conditionally released shall be under the supervision of United States probation officers, supervisory agents appointed by the Attorney General, and voluntary supervisory agents approved by the Commission. The Commission is authorized to encourage the formation of voluntary organizations composed of members who will serve without compensation as voluntary supervisory agents and sponsors. The powers and duties of voluntary supervisory agents and sponsors shall be limited and defined by regulations adopted by the Commission.]

[§ 5020. Apprehension of released offenders

[If, at any time before the unconditional discharge of a committed youth offender, the Commission is of the opinion that such youth offender will be benefited by further treatment in an institution or other facility the Commission may direct his return to custody or if necessary may issue a warrant for the apprehension and return to custody of such youthful offender and cause such warrant to be executed by a United States probation officer, an appointed supervisory agent, a United States marshal, or any officer of a Federal penal or correctional institution. Upon return to custody, such youth offender shall be given a revocation hearing by the Commission.]

[§ 5021. Certificate setting aside conviction

[(a) Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.

[(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.]

[§ 5022. Applicable date

[This chapter shall not apply to any offense committed before its enactment.]

[§ 5023. Relationship to Probation and Juvenile Delinquency Acts

[(a) Nothing in this chapter shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect the provisions of chapter 231 of this title or the Act of June 25, 1910 (ch. 433, 36 Stat. 864), as amended (ch. 1, title 24, of the D. of C. Code), both relative to probation.

[(b) Nothing in this chapter shall be construed in any wise to amend, repeal, or affect the provisions of chapter 403 of this title (the Federal Juvenile Delinquency Act), or limit the jurisdiction of the United States Courts in the administration and enforcement of that chapter except that the powers as to parole of juvenile delinquents shall be exercised by the Division.

[(c) Nothing in this chapter shall be construed in any wise to amend, repeal, or affect the provisions of the Juvenile Court Act of the District of Columbia (ch. 9, title 11, of the D. of C. Code).]

[§ 5024. Where applicable

[This chapter shall apply in the States of the United States and in the District of Columbia.]

[§ 5025. Applicability to the District of Columbia

[(a) The Commissioner of the District of Columbia is authorized to provide facilities and personnel for the treatment and rehabilitation of youth offenders convicted of violations of any law of the United States applicable exclusively to the District of Columbia or to contract with the Director of the Bureau of Prisons for their treatment and rehabilitation, the cost of which may be paid from the appropriation for the District of Columbia.

[(b) When facilities of the District of Columbia are utilized by the Attorney General for the treatment and rehabilitation of youth offenders convicted of violations of laws of the United States not applicable exclusively to the District of Columbia, the cost shall be paid from the "Appropriation for Support of United States Prisoners".

[(c) All youth offenders committed to institutions of the District of Columbia shall be under the supervision of the Commissioner of the District of Columbia, and he shall provide for their maintenance, treatment, rehabilitation, supervision, conditional release, and discharge in conformity with the objectives of this chapter.]

[§ 5026. Parole of other offenders not affected

[Nothing in this chapter shall be construed as repealing or modifying the duties, power, or authority of the Board of Parole, or of the Board of Parole of the District of Columbia, with respect to the parole of United States prisoners, or prisoners convicted in the District of Columbia, respectively, not held to be committed youth offenders or juvenile delinquents.]

CHAPTER 403—JUVENILE DELINQUENCY

Sec.

5031. Definitions.
5032. Delinquency proceedings in district courts; transfer for criminal prosecution.
5033. Custody prior to appearance before magistrate.
5034. Duties of magistrate.
5035. Detention prior to disposition.
5036. Speedy trial.
5037. Dispositional hearing.
5038. Use of juvenile records.
5039. Commitment.
5040. Support.
5041. [Parole.] [Repealed.]
5042. [Revocation of parole or probation.] *Revocation of Probation.*

* * * * * * *

§ 5037. Dispositional hearing

[(a) If a juvenile is adjudicated delinquent, a separate dispositional hearing shall be held no later than twenty court days after trial unless the court has ordered further study in accordance with subsection (c). Copies of the presentence report shall be provided to the attorneys for both the juvenile and the Government a reasonable time in advance of the hearing.

[(b) The court may suspend the adjudication of delinquency or the disposition of the delinquent on such conditions as it deems proper, place him on probation, or commit him to the custody of the Attorney General. Probation, commitment, or commitment in accordance with subsection (c) shall not extend beyond the juvenile's twenty-first birthday or the maximum term which could have been imposed on an adult convicted of the same offense, whichever is sooner, unless the juvenile has attained the nineteenth birthday at the time of disposition, in which case probation, commitment, or commitment in accordance with subsection (c) shall not exceed the lesser of two years or the maximum term which could have been imposed on an adult convicted of the same offense.]

(a) If the court finds a juvenile to be a juvenile delinquent, the court shall hold a disposition hearing concerning the appropriate disposition no later than twenty court days after the juvenile delinquency hearing unless the court has ordered further study pursuant to subsection (e). After the disposition hearing, and after considering any pertinent policy statements promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994, the court may suspend the find-

ings of juvenile delinquency, enter an order of restitution pursuant to section 3556, place him on probation, or commit him to official detention. With respect to release or detention pending an appeal or a petition for a writ of certiorari after disposition, the court shall proceed pursuant to the provisions of chapter 207.

(b) The term for which probation may be ordered for a juvenile found to be a juvenile delinquent may not extend—

(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

(A) the date when the juvenile becomes twenty-one years old; or

(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult; or

(2) in the case of a juvenile who is between eighteen and twenty-one years old, beyond the less of—

(A) three years; or

(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult.

The provisions dealing with probation set forth in sections 3563, 3564, and 3565 are applicable to an order placing a juvenile on probation.

(c) The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend—

(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

(A) the date when the juvenile becomes twenty-one years old; or

(B) the maximum term of imprisonment that would be authorized by section 3581(b) if the juvenile had been tried and convicted as an adult; or

(2) in the case of a juvenile who is between eighteen and twenty-one years old—

(A) who if convicted as an adult would be convicted of a Class A, B, or C felony, beyond five years; or

(B) in any other case beyond the lesser of—

(i) three years; or

(ii) the maximum term of imprisonment that would be authorized by section 3581(b) if the juvenile had been tried and convicted as an adult.

[(c)**]** *(d)* If the court desires more detailed information concerning an alleged or adjudicated delinquent, it may commit him, after notice and hearing at which the juvenile is represented by counsel, to the custody of the Attorney General for observation and study by an appropriate agency. Such observation and study shall be conducted on an out-patient basis, unless the court determines that inpatient observation and study are necessary to obtain the desired information. In the case of an alleged juvenile delinquent, inpatient study may be ordered only with the consent of the juvenile and his attorney. The agency shall make a complete study of the alleged or adjudicated delinquent to ascertain his personal traits, his capabilities, his background, any previous delinquency or criminal experience, any mental or physical defect, and any other relevant factors. The Attorney General shall submit to the court and the attorneys for the juvenile and the Government the results of the study within thirty days after the commitment of the juvenile, unless the court grants additional time.

* * * * * * *

[§ 5041. Parole

[A juvenile delinquent who has been committed may be released on parole at any time under such conditions and regulations as the United States Parole Commission deems proper in accordance with the provisions in section 4206 of this title.]

§ 5042. Revocation of [parole or] probation

Any juvenile [parolee or] probationer shall be accorded notice and a hearing with counsel before his [parole or] probation can be revoked.

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FEDERAL RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

TABLE OF RULES

* * * * * * *

- VII. Judgment:
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    - (b) Judgment:
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38. Stay of Execution.
(a) Death.
(b) Imprisonment.
(c) Fine.
(d) Probation.
(e) Criminal forfeiture, notice to victims, and restitution.
(f) Disabilities.

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VII. JUDGMENT

Rule 32. Sentence and Judgment

(a) SENTENCE.—

* * * * * * *

[(1) IMPOSITION OF SENTENCE.—Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall

[(A) determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

[(B) afford counsel an opportunity to speak on behalf of the defendant; and

[(C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

The attorney for the government shall have an equivalent opportunity to speak to the court.]

(1) IMPOSITION OF SENTENCE.—Sentence shall be imposed without unnecessary delay, but the court may, upon a motion that is jointly filed by the defendant and by the attorney for the Government and that asserts a factor important to the sentencing determination is not capable of being resolved at that time, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also—

(A) determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of the sentence.

The attorney for the Government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.

(2) NOTIFICATION OF RIGHT TO APPEAL.—After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal, *including any right to appeal the sentence,* and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, *except that the court shall advise the defendant of any right to appeal his sentence.* If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

* * * * * * *

(c) Presentence Investigation.

(1) WHEN MADE.—[The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.] *A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record.*

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

[(2) REPORT.—The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correction of treatment of the defendant, and such other information as may be required by the court.]

(2) REPORT.—The report of the presentence investigation shall contain—

(A) information about the history and characteristics of the defendant, including his prior criminal record, if any, his financial condition, and any circumstances affecting his behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer

believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

(F) such other information as may be required by the court.

(3) DISCLOSURE.

(A) At a reasonable time before imposing sentence the court shall permit the defendant and his counsel to read the report of the presentence investigation **[**exclusive of any recommendation as to sentence,**]**, *including the information required by subdivision (c)(2) but not including any final recommendation as to sentence*, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and his counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and his counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons [or the Parole Commission].

(E) Any copies of the presentence investigation report made available to the defendant and his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion, otherwise directs.

(F) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons [or the Parole Commission pursuant to 18 U.S.C. §§ 4205(c), 4252, 5010(e), or 5037(c)] *pursuant to 18 U.S.C. § 3552(b)* shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

(d) Plea Withdrawal.—If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, [imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c),] the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

* * * * * * *

[Rule 35. Correction or Reduction of Sentence

[(a) Correction of Sentence.—The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

[(b) Reduction of Sentence.—The court may reduce a sentence within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

Rule 35. Correction of Sentence

(a) Correction of a Sentence on Remand.—The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court—

(1) for imposition of a sentence in accord with the findings of the court of appeals; or

(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

(b) Correction of Sentence for Changed Circumstances.—The court, on motion of the government, may within one year after

the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).

* * * * * * *

Rule 38. Stay of Execution [, and Relief Pending Review]

[(a) Stay of Execution.]

[(1)] *(a)* Death.—A sentence of death shall be stayed if an appeal is taken *from the conviction or sentence.*

[(2)] *(b)* Imprisonment.—A sentence of imprisonment shall be stayed if an appeal is taken *from the conviction or sentence* and the defendant is released pending disposition of appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. If not stayed, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where his appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the court of appeals.

[(3)] *(c)* Fine.—A sentence to pay a fine [or a fine and costs] if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine [and costs] in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

[(4) Probation.—An order placing the defendant on probation may be stayed if an appeal is taken. If not stayed, the court shall specify when the term of probation shall commence. If the order is stayed the court shall fix the terms of the stay.]

(d) Probation.—A sentence of probation may be stayed if an appeal from the conviction or sentence is taken. If the sentence is stayed, the court shall fix the terms of the stay.

[*(b) [Abrogated]*]

[*(c) [Abrogated]*]

(e) Criminal Forfeiture, Notice to Victims, and Restitution.—A sanction imposed as part of the sentence pursuant to 18 U.S.C. 3554, 3555, or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

(f) Disabilities.—A civil or employment disability arising under a Federal statute by reason of the defendant's conviction or sentence, may, if an appeal is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may enter a restraining order or an injunction, or

take any other action that may be reasonably necessary to protect the interest represented by the disability pending disposition of the appeal.

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IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 40. Commitment to Another District

(a) APPEARANCE BEFORE FEDERAL MAGISTRATE. * * *

* * * * * * *

(d) ARREST OF PROBATIONER.—If a person is arrested for a violation of his probation in a district other than the district having probation jurisdiction, he shall be taken without unnecessary delay before the nearest available federal magistrate. The federal magistrate shall:

(1) Proceed under Rule 32.1 if jurisdiction over the probationer is transferred to that district pursuant to 18 U.S.C. § [3653] *3605*;

* * * * * * *

Rule 54. Application and Exception

(a) COURTS. * * *

* * * * * * *

(c) APPLICATION OF TERMS. * * *

* * * * * * *

"Federal magistrate" means a United States magistrate as defined in 28 U.S.C. §§ 631–639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

"Grade" includes the issue whether, for the purposes of section 3571 (Sentence of Fine), a misdemeanor resulted in the loss of human life.

"Judge of the United States" includes a judge of a district court, court of appeals, or the Supreme Court.

* * * * * * *

["Petty offense" is defined in 18 U.S.C. § 1(3).]

"Petty offense" means a class B or C misdemeanor or an infraction.

* * * * * * *

COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970

PUBLIC LAW 91–513; 84 STAT. 1236

* * * * * * *

TITLE II—CONTROL AND ENFORCEMENT

* * * * * * *

PART D—OFFENSES AND PENALTIES

Sec. 401. Prohibited acts A—penalties.
Sec. 402. Prohibited acts B—penalties.
Sec. 403. Prohibited acts C—penalties.
Sec. 404. Penalty for simple possession; conditional discharge and expunging of records for first offense.
Sec. 405. Distribution to persons under age twenty-one.
Sec. 406. Attempt and conspiracy.
Sec. 407. Additional penalties.
Sec. 408. Continuing criminal enterprise.
[Sec. 409. Dangerous special drug offender sentencing.]
Sec. 410. Information for sentencing.
Sec. 411. Proceedings to establish previous convictions.

PART D—OFFENSES AND PENALTIES

PROHIBITED ACTS A—PENALTIES

SEC. 401. (a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

* * * * * * *

(b) Except as otherwise provided in section 405, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. [Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.]

(B) In the case of a controlled substance in sechedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. [Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.]

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. [Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.]

* * * * * * *

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in [subsections (a) and (b) of] section 404 *and section 3607 of title 18, United States Code.*

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this subchapter, phencyclidine (as defined in section 830(c)(2) of this title) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. [Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.]

[(c) A special parole term imposed under this section or section 405 may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 405 shall be in addition to, and not in lieu of, any other parole provided for by law.]

PENALTY FOR SIMPLE POSSESSION; CONDITIONAL DISCHARGE AND EXPUNGING OF RECORDS FOR FIRST OFFENSE

SEC. 404. [(a)] It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. Any person who violates this subsection shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both, except that if he commits such offense after a prior conviction or convictions under this subsection have become final, he shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

[(b) (1) If any person who has not previously been convicted of violating subsection (a) of this section, any other provision of this title or title III, or any other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, is found guilty of a violation of subsection (a) of this section after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of his probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the Department of Justice solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under this part for second or subsequent convictions) or for any other purpose. Discharge and dismissal under this section may occur only once with respect to any person.

[(2) Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person, if he was not over twenty-one years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained by the Department of Justice under paragraph (1)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over twenty-one years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.]

DISTRIBUTION TO PERSONS UNDER AGE TWENTY-ONE

SEC. 405. (a) Any person at least eighteen years of age who violates section 401(a)(1) by distributing a controlled substance to a person under twenty-one years of age is (except as provided in subsection (b) punishable by [(1)] a term of imprisonment, or a fine, or both, up to twice that authorized by section 401(b)[, and (2) at least twice any special parole term authorized by section 401(b), for a first offense involving the same controlled substance and schedule].

(b) Any person at least eighteen years of age who violates section 401(a)(1) by distributing a controlled substance to a person under twenty-one years of age after a prior conviction or convictions under subsection (a) of this section (or under section 303(b)(2) of the Federal Food, Drug, and Cosmetic Act as in effect prior to the effective date of section 701(b) of this Act) have become final, is punishable by [(1)] a term of imprisonment, or a fine, or both, up to three times that authorized by section 401(b)[, and (2) at least three times any special parole term authorized by section 401(b), for a second or subsequent offense involving the same controlled substance and schedule].

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CONTINUING CRIMINAL ENTERPRISE

SEC. 408. (a) (1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

* * * * * * *

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, [and section 4202 of title 18 of the United States Code] and the Act of July 15, 1932 (D.C. Code, secs. 24-203—24-207), shall not apply.

[DANGEROUS SPECIAL DRUG OFFENDER SENTENCING

[SEC. 409. (a) Whenever a United States attorney charged with the prosecution of a defendant in a court of the United States for an alleged felonious violation of any provision of this title or title III committed when the defendant was over the age of twenty-one years has reasons to believe that the defendant is a dangerous special drug offender such United States attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special drug offender who upon conviction for such felonious violation is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special drug offender. In no case shall the fact that the defendant is alleged to be a dangerous special drug offender be an issue upon the trial of such felonious violation, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special drug offender and his counsel.

[(b) Upon any plea of guilty or nolo contendere or vedict or finding of guilty of the defendant of such felonious violation, a hearing shall be held, before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felonious violation and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special drug offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felonious violation. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felonious violation. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

[(c) This section shall not prevent the imposition and execution of a sentence of imprisonment for life or for a term exceeding twenty-five years upon any person convicted of an offense so punishable.

[(d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special drug offender to less than any mandatory minimum penalty prescribed by law for such felonious violation. This section shall not be construed as creating any mandatory minimum penalty.

[(e) A defendant is a special drug offender for purposes of this section if—

[(1) the defendant has previously been convicted in courts of the United States or a State or any political subdivision thereof for two or more offenses involving dealing in controlled substances, committed on occasions different from one another and different from such felonious violation, and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felonious violation, and less than five years have elapsed between the commission of such felonious violation and either the defendant's release, or parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense involving dealing in controlled substances and punishable by death or imprisonment in excess of one year under applicable laws of the United States or a State or any political subdivision thereof; or

[(2) the defendant committed such felonious violation as part of a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

[(3) such felonious violation was, or the defendant committed such felonious violation in furtherance of, a conspiracy with three or more other persons to engage in a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or dealing, or give or receive a bribe or use force in connection with such dealing. A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such dealing. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938 for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of the Internal Revenue Code of 1954. For purposes of paragraph (2) of this subsection, special skill or expertise in such dealing includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of such dealing, the enlistment of accomplices in such dealing, the escape from detection or apprehension for such dealing, or the disposition of the fruits or proceeds of such dealing. For purposes of paragraphs (2) and (3) of this subsection, such dealing forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

[(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felonious violation is required for the protection of the public from further criminal conduct by the defendant.

[(g) The time for taking an appeal from a conviction for which sentence is imposed after proceedings under this section shall be measured from imposition of the original sentence.

[(h) With respect to the imposition, correction, or reduction of a sentence after proceedings under this section, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felonious violation and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of the abuse of the right of the United States to take such review.]

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TITLE III—IMPORTATION AND EXPORTATION; AMENDMENTS AND REPEALS OF REVENUE LAWS

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PROHIBITED ACTS A—PENALTIES

SEC. 1010. (a) Any person who—

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(b)(1) In the case of a violation under subsection (a) with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. [If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.]

(2) In the case of a violation under subsection (a) with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. [If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.]

[(c) A special parole term imposed under this section or section 1012 may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 1012 is in addition to, and not in lieu of, any other parole provided for by law.]

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SECOND OR SUBSEQUENT OFFENSES

SEC. 1012. (a) Any person convicted of any offense under this part is, if the offense is a second or subsequent offense, punishable by a term of imprisonment twice that otherwise authorized, by twice the fine otherwise authorized, or by both. If the conviction is for an offense punishable under section 1010(b), and if it is the offender's second or subsequent offense, the court shall impose, in addition to any term of imprisonment and fine, twice the special parole term otherwise authorized.

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TITLE 23: HIGHWAYS

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CHAPTER 1—FEDERAL-AID HIGHWAYS

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Sec.
114. Construction.

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§ 114. Construction

(a) The construction of any highways or portions of highways located on a Federal-aid system shall be undertaken by the respective State highway departments or under their direct supervision. Except as provided in section 117 of this title, such construction shall be subject to the inspection and approval of the Secretary. The construction work and labor in each State shall be performed under the direct supervision of the State highway department and in accordance with the laws of that State and applicable Federal laws. Construction may be begun as soon as funds are available for expenditure pursuant to subsection (a) of section 118 of this title. On any project where actual construction is in progress and visible to highway users, the State highway department shall erect such informational sign or signs as prescribed by the Secretary, identifying the project and the respective amounts contributed therefor by the State and Federal Governments.

(b) Convict labor shall not be used in such construction unless it is labor performed by convicts who are on parole, *supervised release,* or probation.

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TITLE 26: INTERNAL REVENUE CODE

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CHAPTER 53—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS

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SUBCHAPTER D—PENALTIES AND FOREFEITURES

Sec.
5871. Penalties.
5872. Forfeitures.

§ 5871. Penalties

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both [, and shall become eligible for parole as the Board of Parole shall determine].

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TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE

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PART II—DEPARTMENT OF JUSTICE

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31. The Attorney General	501

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CHAPTER 31—THE ATTORNEY GENERAL

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501. Executive department.
502. Seal.
503. Attorney General.
504. Deputy Attorney General.
505. Solicitor General.
506. Assistant Attorneys General.
507. Assistant Attorney General for Administration.
508. Vacancies.
509. Functions of the Attorney General.

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§ 509. Functions of the Attorney General

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions—

(1) vested by subchapter II of chapter 5 of title 5 in hearing examiners employed by the Department of Justice;

(2) of the Federal Prison Industries, Inc.;

(3) of the Board of Directors and officers of the Federal Prison Industries, Inc. **[**; and**]**
[(4) of the Board of Parole.**]**

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CHAPTER 39—SPECIAL PROSECUTOR [1]

Sec.
591. Applicability of provisions of this cnapter.
592. Application for appointment of a special prosecutor.
593. Duties of the division of the court.
594. Authority and duties of a special prosecutor.
595. Reporting and congressional oversight.
596. Removal of a special prosecutor; termination of office.
597. Relationship with Department of Justice.
598. Termination of effect of chapter.

§ 591. APPLICABILITY OF PROVISIONS OF THIS CHAPTER

(a) The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives specific information that any of the persons described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a **[**petty offense**]** *Class B or C misdemeanor or an infraction.*

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PART III—COURT OFFICERS AND EMPLOYEES

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CHAPTER 58—UNITED STATES SENTENCING COMMISSION

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992. Terms of office; compensation.
993. Powers and duties of Chairman.
994. Duties of the Commission.
995. Powers of the Commission.
996. Director and staff.
997. Annual report.
998. Definitions.

§ 991. United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chairman. At least two of the members shall be Federal judges in regular active service selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party. The Attorney General, or his designee, shall be an ex officio, nonvoting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the proposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

§ 992. Terms of office; compensation

(a) The voting members of the United States Sentencing Commission shall be appointed for six-year terms, except that the initial terms of the first members of the Commission shall be staggered so that—

(1) two members, including the chairman, serve terms of six years;

(2) three members serve terms of four years; and

(3) two members serve terms of two years.

(b) No voting member may serve more than two full terms. A voting member appointed to fill a vacancy that occurs before the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term.

(c) The Chairman of the Commission shall hold a full-time position and shall be compensated during the term of office at the annual rate at which judges of the United States courts of appeals are compensated. The voting members of the Commission, other than the Chairman, shall hold full-time positions until the end of the first six years after the sentencing guidelines go into effect pursuant to section 225(a)(1)(B)(ii) of the Sentencing Reform Act of 1983, and shall be compensated at the annual rate at which judges of the United States courts of appeals are compensated. Thereafter, the voting members of the Commission, other than the Chairman, shall hold part-time positions and shall be paid at the daily rate at which judges of the United States courts of appeals are compensated. A Federal judge may serve as a member of the Commission without resigning his appointment as a Federal judge.

§ 993. Powers and duties of Chairman

The Chairman shall—

(a) call and preside at meetings of the Commission, which shall be held for at least two weeks in each quarter after the members of the Commission hold part-time positions; and

(b) direct—

(1) the preparation of requests for appropriations for the Commission; and

(2) the use of funds made available to the Commission.

§ 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term; and

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further

the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3573, and 3582(c) of title 18;

(D) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(E) the temporary release provisions set forth in section 3622 of title 18, and the pre-release custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the probation revocation provisions set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of probation or supervised release set forth in sections 3563(c), 3564(d), and 3583(e) of title 18.

(b) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code. If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than 25 per centum.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release,

or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter.

(h) The Commission shall assure that the guidelines will specify a sentence to a term of imprisonment at or near the maximum term authorized by section 3581(b) of title 18, United States Code, for categories of defendants in which the defendants is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955 and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a).

(i) The Commission shall assure that the guidelines will specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3150 (penalties for failure to appear) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit

an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(o) The Commission, at or after the beginning of a regular session of Congress but not later than the first day of May, shall report to the Congress any amendments of the guidelines promulgated pursuant to subsection (a)(1), and a report of the reasons therefor, and the amended guidelines shall take effect one hundred and eighty days after the Commission reports them, except to the extent the effective date is enlarged or the guidelines are disapproved or modified by Act of Congress.

(p) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(q) The Commission, within three years of the date of enactment of the Sentencing Reform Act of 1983, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(r) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

Within one hundred and eighty days of the filing of such petition the Commission shall provide written notice to the defendant whether or not it has approved the petition. If the petition is disapproved the written notice shall contain the reasons for such disapproval. The Commission shall submit to the Congress at least annually an analysis of such written notices.

(s) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(t) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify by what amount the sentences of prisoners serving terms of imprisonment that are outside the applicable guideline ranges for the offense may be reduced.

(u) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(v) The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed a written report of the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

(w) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

§ 995. Powers of the Commission

(a) The Commission, by vote of a majority of the members present and voting, shall have the power to—

(1) establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out the purposes of this chapter;

(2) appoint and fix the salary and duties of the Staff Director of the Sentencing Commission, who shall serve at the discretion of the Commission and who shall be compensated at a rate not

to exceed the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332);

(3) deny, revise, or ratify any request for regular, supplemental, or deficiency appropriations prior to any submission of such request to the Office of Management and Budget by the Chairman;

(4) procure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code;

(5) utilize, with their consent, the services, equipment, personnel, information, and facilities of other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor;

(6) without regard to 31 U.S.C. 3324, enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or nonprofit organization;

(7) accept and employ, in carrying out the provisions of this title, voluntary and uncompensated services, notwithstanding the provisions of 31 U.S.C. 1342, however, individuals providing such services shall not be considered Federal employees except for purposes of chapter 81 of title 5, United States Code, with respect to job-incurred disability and title 28, United States Code, with respect to tort claims;

(8) request such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law;

(9) monitor the performance of probation officers with regard to sentencing recommendations, including application of the Sentencing Commission guidelines and policy statement;

(10) issue instructions to probation officers concerning the application of Commission guidelines and policy statements;

(11) arrange with the head of any other Federal agency for the performance by such agency of any function of the Commission, with or without reimbursement;

(12) establish a research and development program within the Commission for the purpose of—

(A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices; and

(B) assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices;

(13) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;

(14) publish data concerning the sentencing process;

(15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of

such sentences to the factors set forth in section 3553(a) of title 18, United States Code;

(16) collect systematically and disseminate information regarding effectiveness of sentences imposed;

(17) devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field;

(18) devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process;

(19) study the feasibility of developing guidelines for the disposition of juvenile delinquents;

(20) make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy;

(21) hold hearings and call witnesses that might assist the Commission in the exercise of its powers or duties; and

(22) perform such other functions as are required to permit Federal courts to meet their responsibilites under section 3553(a) of title 18, United States Code, and to permit others involved in the Federal criminal justice system to meet their related responsibilities.

(b) The Commission shall have such other powers and duties and shall perform such other functions as may be necessary to carry out the purposes of this chapter, and may delegate to any member or designated person such powers as may be appropriate other than the power to establish general policy statements and guidelines pursuant to section 994(a) (1) and (2), the issuance of general policies and promulgation of rules and regulations pursuant to subsection (a)(1) of this section, and the decisions as to the factors to be considered in establishment of categories of offenses and offenders pursuant to section 994(b). The Commission shall, with respect to its activities under subsections (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (a)(15), (a)(16), (a)(17), and (a)(18), to the extent practicable, utilize existing resources of the Administrative Office of the United States Courts and the Federal Judicial Center for the purpose of avoiding unnecessary duplication.

(c) Upon the request of the Commission, each Federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions.

(d) A simple majority of the membership then serving shall constitute a quorum for the conduct of business. Other than for the promulgation of guidelines and policy statements pursuant to section 994, the Commission may exercise its powers and fulfill its duties by the vote of a simple majority of the members present.

(e) Except as otherwise provided by law, the Commission shall maintain and make available for public inspection a record of the final vote of each member on any action taken by it.

§ 996. Director and staff

(a) The Staff Director shall supervise the activities of persons employed by the Commission and perform other duties assigned to him by the Commission.

(b) The Staff Director shall, subject to the approval of the Commission, appoint such officers and employees as are necessary in the execution of the functions of the Commission. The officers and employees of the Commission shall be exempt from the provisions of part III of title 5, United States Code, except the following chapters: 81 (Compensation for Work Injuries), 83 (Retirement), 85 (Unemployment Compensation), 87 (Life Insurance), 89 (Health Insurance), and 91 (Conflicts of Interest).

§ 997. Annual report

"The Commission shall report annually to the Judicial Conference of the United States, the Congress, and the President of the United States on the activities of the Commission.

§ 998. Definitions

As used in this chapter—

(a) "Commission" means the United States Sentencing Commission;

(b) "Commissioner" means a member of the United States Sentencing Commission;

(c) "guidelines" means the guidelines promulgated by the Commission pursuant to section 994(a) of this title; and

(d) "rules and regulations" means rules and regulations promulgated by the Commission pursuant to section 995 of this title.

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CHAPTER 175—CIVIL COMMITMENT AND REHABILITATION OF NARCOTIC ADDICTS

Sec.
2901. Definitions.

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§ 2901. Definitions

As used in this chapter—

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(e) "Felony" includes any offense in violation of a law of the United States classified as a felony under [section 1] *section 3581* of title 18 of the United States Code, and further includes any offense in violation of a law of any State, any possession or territory of the United States, the District of Columbia, the Canal Zone, or the Commonwealth of Puerto Rico, which at the time of the offense was classified as a felony by the law of the place where that offense was committed.

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(g) "Eligible individual" means any individual who is charged with an offense against the United States, but does not include—

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> (3) and individual against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole, *supervised release,* or mandatory release, has not been fully served: *Provided,* That an individual on probation, parole, *supervised release,* or mandatory release shall be included if the authority authorized to require his return to custody consents to his commitment.

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RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES

TABLE OF RULES

Rule
1. Scope
2. Pretrial Procedures
3. Additional Procedures Applicable Only to Petty Offenses for Which No Sentence of Imprisonment will be Imposed
4. Securing Defendants Appearance; Payment in Lieu of Appearance
5. Record
6. New Trial
7. Appeal
8. Local Rules
9. Definition

* * * * * * *

Rule 8. Local Rules

Rules adopted by a district court for the conduct of trials before magistrates shall not be inconsistent with these rules. Copies of all rules made by a district court shall, upon their promulgation, be filed with the clerk of the district court and furnished to the Administrative Office of the United States Courts.

Rule 9. Definition

As used in these rules, "petty offense" means a Class B or C misdemeanor or an infraction.

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TITLE 29: LABOR

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CHAPTER 11—LABOR-MANAGEMENT REPORTING AND DISCLOSURE PROCEDURE

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Subchapter VI—Safeguards for Labor Organizations

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504. Prohibition against certain persons holding office; violations and penalties.

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§504. Prohibition against certain persons holding office; violations and penalties

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or

(2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization,

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) [the Board of Parole of the United States Department of Justice] *if the offense is a Federal offense, the sentencing judge or, if the offense is a State or local offense, on motion of the United States Department of Justice, the district court of the United States for the district in which the offense was committed, pursuant to sentencing guidelines and policy statements issued pursuant to 28 U.S.C. 994(a),* determines that such person's service in any capacity referred to in clause (1) or (2) would not be contrary to the purposes of this chapter. Prior to making any such determination the [Board] *Court* shall hold [an administrative] *a* hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The [Board's] *Court's* determination in any such proceeding shall be final. No labor organization or officer thereof shall knowingly permit any person to assume or hold any office or paid position in violation of this subsection.

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) For the purposes of this section, any person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event, regardless of whether such conviction occurred before or after September 14, 1959.

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CHAPTER 17—COMPREHENSIVE EMPLOYMENT AND TRAINING PROGRAMS

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Subchapter I—Comprehensive Manpower Services

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Sec.
927. Special limitations.

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§ 927. Special limitations

(a) No individual shall be selected as an enrollee unless there is reasonable expectation that the individual can participate successfully in group situations and activities, is not likely to engage in behavior that would prevent other enrollees from receiving the benefit of the program or be incompatible with the maintenance of sound discipline and satisfactory relationships between the center to which the individual might be assigned and surrounding communities, and unless the individual manifests a basic understanding of both the rules to which the individual will be subject and of the consequences of failure to observe those rules.

(b) An individual on probation **[**or parole**]** , *parole, or supervised release* may be selected only if release from the supervision of the probation or parole officials is satisfactory to those officials and the Secretary and does not violate applicable laws or regulations. No individual shall be denied a position in the Job Corps solely on the basis of that individual's contact with the criminal justice system.

CHAPTER 18—EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

Subchapter I—Protection of Employee Benefit Rights

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SUBTITLE B—REGULATORY PROVISIONS

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Sec.
1111. Persons prohibited from holding certain positions.
  (a) Conviction or imprisonment.
  (b) Penalty.
  (c) Definitions.

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§ 1111. Persons prohibited from holding certain positions

CONVICTION OR IMPRISONMENT

(a) No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of Title 21, murder, rape, kidnaping, perjury, assault with intent to kill, any crime described in section 80a-9(a)(1) of Title 15, a violation of any provision of this Act, a violation of section 186 of Title 29, a violation of chapter 63 of Title 18, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of Title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959, or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—

(1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan, or

(2) as a consultant to any employee benefit plan,

during or for five years after such conviction or after the end of such imprisonment, whichever is the later, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the [Board of Parole of the United States Department of Justice] *if the offense is a Federal offense, the sentencing judge or, if the offense is a State or local offense, on motion of the United States Department of Justice, the district court of the United States for the district in which the offense was committed, pursuant to sentencing guidelines and policy statements issued pursuant to 28 U.S.C. 994(a),* determines that such person's service in any capacity referred to in paragraph (1) or (2) would not be contrary to the purposes of this subchapter. Prior to making any such determination the [Board] *Court* shall hold [an administrative] *a* hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The [Board's] *Court's* determination in any such proceeding shall be final. No person shall knowingly permit any other person to serve in any capacity referred to in paragraph (1) or (2) in violation of this subsection. Notwithstanding the preceding provisions of this subsection, no corporation or partnership will be precluded from acting as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee, of any employee benefit plan or as a consultant to any employee benefit plan without a notice, hearing, *and determination* by such Board of Parole that such service would be inconsistent with the intention of this section.

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DEFINITIONS

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(c) For the purposes of this section:

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(3) A period of parole *or supervised release* shall not be considered as part of a period of imprisonment.

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TITLE 42: THE PUBLIC HEALTH AND WELFARE

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CHAPTER 6A—PUBLIC HEALTH SERVICE

Subchapter I—Administration

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PART E—NARCOTIC ADDICTS AND OTHER DRUG ABUSERS

§ 257. Care and treatment of narcotic addicts

SURGEON GENERAL AUTHORIZED TO PROVIDE PROGRAMS

(a) The Surgeon General is authorized to provide for the confinement, care, protection, treatment, and discipline of persons addicted to the use of habit-forming narcotic drugs who are civilly committed to treatment **[**or convicted of offenses against the United States and sentenced to treatment**]** under the Narcotic Addict Rehabilitation Act of 1966, **[**addicts who are committed to the custody of the Attorney General pursuant to the provisions of the Federal Youth Corrections Act,**]** addicts and other persons with drug abuse and drug dependence problems who voluntarily submit themselves for treatment, and addicts convicted of offenses against the United States and who are not sentenced to treatment under the Narcotic Addict Rehabilitation Act of 1966, including persons convicted by general courts-martial and consular courts. Such care and treatment shall be provided at hospitals of the Service especially equipped for the accommodation of such patients or elsewhere where authorized under other provisions of law, and shall be designed to rehabilitate such persons, to restore them to health, and, where necessary, to train them to be self-supporting and self-reliant; but nothing in this section or in this part shall be construed to limit the authority of the Surgeon General under other provisions of law to provide for the conditional release of patients and for aftercare under supervision. In carrying out this subsection, the Secretary shall establish in each hospital and other appropriate medical facility of the Service a treatment and rehabilitation program for drug addicts and other persons with drug abuse and drug dependence problems who are in the area served by such hospital or other facility; except that the requirement of this sentence shall not apply in the case of any such hospital or other facility with respect to which the Secretary determines that there is not sufficient need for such a program in such hospital or other facility.

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§ 259. Convict addicts or other persons with drug abuse or drug dependence problems

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GRATUITIES AND TRANSPORTATION FURNISHED UPON DISCHARGE OR RELEASE ON PAROLE

(d) Every person convicted of an offense against the United States, upon discharge, or upon release on parole, *or supervised release* from a hospital of the Service, shall be furnished with the gratuities and transportation authorized by law to be furnished to prisoners upon release from a penal, correctional, disciplinary, or reformatory institution.

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TITLE 49: TRANSPORTATION

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Chapter 115—Federal-State Relations

Sec.
11501. Interstate Commerce Commission authority over intrastate transportation.
11502. Conferences and joint hearings with State authorities.
11503. Tax discrimination against rail transportation property.
11503a. Tax discrimination against motor carrier transportation property.
11504. Withholding State and local income tax by certain carriers.
11505. State action to enjoin rail carriers from certain actions.
11506. Registration of motor carriers by a State.
11507. Prison-made property governed by State law.

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§ 11507. Prison-made property governed by State law

Goods, wares, and merchandise produced or mined in a penal institution or by a prisoner not on parole, *supervised release,* or probation and transported into and used, sold, or stored in a State or territory or possession of the United States, is subject to the laws of that State, territory, or possession. This section does not apply to commodities produced in a penal institution of the United States Government for its use.

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TITLE 50: WAR AND NATIONAL DEFENSE

APPENDIX

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Military Selective Service Act 451

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§ 460. Selective Service System

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(b) Administrative provisions

The President is authorized—

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(7) to prescribe eligibility, rules, and regulations governing the [parole] *release* for service in the armed forces, or for any other special service established pursuant to this title [sections 451 to 471a of this Appendix], of any person convicted of a violation of any of the provisions of this title [said sections];

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MINORITY VIEWS OF SENATOR MATHIAS

The proponents of the sentencing reform contained in S. 668 base their proposals upon two observations about the Federal criminal justice system with which hardly anyone disagrees. First, there is too much disparity in criminal sentences. Second, sentences to imprisonment are too indeterminate in duration.

Disagreement arises with respect to how best to reduce the disparity and indeterminacy. I believe that the solution provided by S. 668 is an illusory one. It would replace today's unstructured sentencing practices with an inflexible and potentially costly guidelines system.

The Federal judges and the U.S. Parole Commission are two of the most visible actors in our current sentencing system. Not surprisingly, they are the targets of this bill, which would abolish the latter, and consign the former to the task of operating a sentencing decision machine designed and built by somebody else.

Underlying S. 668 is a profound mistrust of the Federal bench. This attitude assumes that Federal judges, acting through the Judicial Conference, would be unwilling or unable to draw up sentencing guidelines if instructed to do so by the Congress. It further assumes that Federal judges would not conscientiously apply voluntary guidelines, but instead must be stripped of their traditional sentencing discretion, and instructed to adhere to preordained guidelines except in the most extraordinary circumstances. All of this overlooks what seems to me to be obvious: the cooperation of the bench is an essential ingredient in any effective sentencing reform. The Judicial Conference's skepticism about this bill, and the Committee's rejection of the sensible alternatives which the judges have proposed, do not augur well for the success of this bold experiment.

Of course, by drastically reducing judicial discretion in sentencing, S. 668 in no way eliminates discretion from the system. It merely displaces it from the courtroom, where it is exercised under the scrutiny of the public, to other venues. It will turn up in the offices of the United States Attorneys, whose individual charging and plea-bargaining policies will dictate the sentence for the vast majority of defendants, who plead guilty. It will creep into the work of the probation officers, who will, under this bill, have the awesome responsibility of transforming a complex array of facts about the offender and his or her offense into one box on a grid of "offense and offender characteristics." And it will, of course, become the daily bread of the United States Sentencing Commission, a body of Presidential appointees without life tenure. I doubt that the public will be better served when instead of U.S. District Judge, all of these people—and therefore, no one of them—are responsible for the sentence imposed upon a Federal criminal defendant.

Nor will the Sentencing Commission's responsibilities end with the creation of sentencing guidelines. This new bureaucracy will be empowered to promulgate regulations on a vast array of issues which are today confided to judicial discretion. Without evidence that the Federal bench is incompetent to decide such questions such as when sentences should be modified on humanitarian grounds, the justification for the powers which the bill gives to the Sentencing Commission in these collateral areas is not persuasive. It is ironic that some of the Senate's most vociferous foes of big government have lent their support to this proposal to create another Federal bureaucracy with a sweeping charter to impose solutions for problems which may not really exist.

I have described this bill as a budget buster, and nothing in the consideration which we have given it in this Congress has caused me to modify my views. If enacted, S. 668 will increase Federal expenditures in several ways. It would create a multi-million dollar Sentencing Commission with a permanent charter. It would transfer the responsibility for post-release supervision from the relative efficient Parole Commission to the Federal courts, necessitating hundreds or perhaps thousands of jury trials per year on contempt petitions. Most significantly, it would do absolutely nothing to reverse the alarming trend toward more and more indiscriminate use of incarceration in the Federal prisons, which are already bulging with their highest populations in history, despite recent evidence of a leveling off or decline in crime rates. The report accompanying the bill professes "neutrality" toward the appropriateness of incarceration; the Committee rejected an amendment which would have required the imposition of the least severe appropriate sanction in each case. The Committee also refused to direct the Sentencing Commission to design its guidelines to avoid increases in the prison population, or in the average sentence served by Federal prisoners. Finally, the Committee rejected safety valve provisions which would have permitted modifications of sentences where needed to prevent serious overcrowding of prison facilities. These actions suggest that the proponents of this legislation are not sufficiently serious about the need to build in safeguards to protect against the fiscal and social costs of overreliance on incarceration. Anti-crime rhetoric for today's consumption is more evident in this bill than prudent planning to minimize the burden on tomorrow's taxpayers.

What most strikingly characterizes this bill are unanswered questions about the intentions, and the likely effects, of this sweeping sentencing reform. These unresolved problems led to my vote against S. 668 in Committee. When the full Senate turns to this legislation, I commend these questions to the thoughtful attention of my colleagues.

ADDITIONAL VIEWS OF SENATOR JOHN P. EAST

A significant disparity exists between the sentences that courts impose on similarly situated offenders. As the main body of this report demonstrates, S. 668, by implementing a comprehensive Federal criminal law, may begin to rectify this injustice by making it less possible to subject offenders guilty of similar crimes to radically different penalties. Also, if the system functions according to plan, it will let both the victim and the community know how long a defendant will be incarcerated. No longer will the victim of a crime, who heard the judge give a stiff sentence to his assailant, have the shock of meeting the offender on the street just a few years later because of his early release on parole. A victim will at least know at the time of sentencing how long an offender will have to serve.

I think it important, however, to point out that the sentencing provisions of S. 668, while they may help ensure that the law does not treat some criminals unfairly, will not necessarily address other major concerns of society or of the victims of violent crime. The main body of this report places most of its emphasis on removing disparities in sentencing. But removing such disparities does not by itself mean that sentences will be fair either to the victims of crime, to society at large, or even to the criminal himself. What the victims of crime have been protesting is not that similarly situated offenders receive different penalties. Rather, they have been protesting that violent offenders have been receiving light sentences, sentences grossly disproportionate to the gravity of the crimes they have committed. One victim's father, for instance, told the President's Task Force on Victims of Crime that "the man who strangled my daughter to death will only serve four years." His concern was not that some criminals were being treated unfairly and receiving much stiffer penalties than others. Instead, he resented that his daughter's life had been valued so cheaply. Although society also suffers when courts apply penalties in a disparate manner, the present crisis in our criminal justice system arises more from releasing too many violent offenders back onto the streets. Finally, a narrow concern for removing disparities in sentencing might fail to protect the real interest of offenders. We could, for example, equalize the law by giving the same stiff penalty, such as life imprisonment, to all petty thieves. That would hardly be a just approach. In the alternative, we could equalize the law by giving the most lenient possible sentence to all such offenders, but, as Plato reminds us in his *Gorgias,* a wrongdoer who escapes punishment suffers a greater evil than one who is punished. Just punishment fits the crime, and I fear that under these new guidelines sentences could end up being much too low.

The situation in Minnesota gives some grounds to my fear. Citing a recent study published by the National Academy of Sciences, this

Committee's report observes that Minnesota's program of sentencing reform has succeeded in achieving "its goal of reducing unwarranted sentencing disparity, increasing emphasis on punishment for violent offenders, and avoiding unintended burdens on the prison system." It then adds that "this finding is especially important to the consideration of this bill because of the substantial similarity between the Minnesota legislation and the Federal sentencing reform measure."

I agree that it is important to look at Minnesota. It comes the closest of any State to providing a case study of how well the reforms set forth in this bill would work. But I do not find the picture in Minnesota nearly as rosy as the one the National Academy of Sciences has painted. Minnesota continues to have significant problems even with its new system.

This past June, in fact, the Minnesota Sentencing Guidelines Commission gave preliminary approval to lowering recommended sentences for many offenses because prisons in that State have become intolerably overcrowded. The original implementation of Minnesota's system of sentencing guidelines was supposed to have averted such overcrowding, but State officials project that their five adult-male prisons will be full by January 1985. The new set of guidelines proposed last June would place less emphasis on the role a defendant's criminal history plays in determining his sentence, despite the fact that habitual offenders pose a greater danger to society. Under the proposed guidelines, even violent offenders would receive significantly lighter sentences. Thus, while the proposed penalty for first-degree criminal sexual conduct and first degree-assault would remain at 43 months, the recommended sentence for a person with a lengthy criminal history would decrease from 113 to 84 months. The guidelines would leave the penalty for aggravated robbery the same—24 months—but reduce from 97 to 52 months the recommendation for repeat offenders. These changes hardly seem consistent with an "increasing emphasis on punishment for violent offenders."

While other factors may have contributed to prison overcrowding, it seems that the Minnesota reforms played a key role in worsening this problem. Prosecutors who have complained loudly about how lenient the sentencing guidelines were have since figured out how to make the system work for them. Under the Minnesota guidelines, an offender's sentence depends on two factors: the seriousness of the offense and the length of the offender's criminal record. Prosecutors have found that they can lengthen a person's criminal record by charging him with more than one crime at a time, and then insisting on pleas to more than one of these crimes, rather than dropping all but one as they did in the past. Under the procedure of "making book on offenders", first-time offenders receive sentences no longer than they used to, but, should they be brought to court again, they have a longer criminal history and receive a harsher criminal sentence. In a letter to Minnesota State legislators dated April 4, 1983, Stephen Rathke, the Chairman of the Minnesota Sentencing Guidelines Commission, listed "making book against offenders" as one of three major factors that had caused the Commission to miscalculate the future prison in Minnesota. Said Mr. Rathka:

> Prosecutors are dismissing fewer felony cases in an apparent and successful effort to build criminal history scores. The precentage of offenders with criminal history scores of four or more has increased greatly. This leads both to more commitments and to longer prison sentences.

Prosecutors who saw that the reforms would impose much higher sentences can hardly be faulted for attempting to keep repeat offenders off the streets. Repeat offenders commit a significantly large proportion of the crimes in this country and effective criminal reform must focus on the dangers that they pose. From the standpoint of fighting crime, it is irrational to do what the Commission has done-not only to reduce sentences for some offenses but also to recommend that criminal history play a lesser role across the board. Since its search for available prison beds has led the Minnesota Commission to depart from the primary concern for fighting crime, I do not think we ought to characterize the Minnesota program as particularly successful.

With respect to the length of sentences, the provisions of S. 668 that govern the establishment of sentencing guidelines at least represent a considerable improvement upon those contained in S. 1630 during the 97th Congress. Unlike the language of S. 1630, S. 668 does not mandate that the Sentencing Commission set guidelines for prison terms on the basis of sentences actually served under current law, except in exigent circumstances. As Senator Biden pointed out on the floor of the Senate, this language would virtually have frozen in current sentencing patterns—patterns in which the average term served is 62 months for homicide, 52 months for rape, and about two years for miscellaneous felonies in general.

Now, thanks to the efforts of Senator Denton, new language has been added requiring the Commission to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense." Furthermore, the Commission is asked independently to "develop a sentencing range that is consistent with the purposes of sentencing described in section 3553 (a)(2) of title 18, United States Code," which includes deterrence, protection of the general public, and the need to provide sentences that are sufficiently severe to promote respect for law and to provide just punishment.

This is a good start. We are no longer embodying in Federal law a statutory mandate that current prison sentences be frozen or reduced. But neither is there any mandate that will force the Sentencing Commission to deal with serious offenses more seriously. Whether sentences for violent crimes, particularly reprehensible offenses, and repetitively criminal conduct, go up, go down, or stay the same will be more or less determined by "the luck of the draw."

At present we simply have no idea what the sentencing guidelines will look like. We do not know, for example, how many categories of sentences will apply to any given crime. Experts in the field indicate that criminologists are presently considering several possible models. Unfortunately, Congress has given the Sentencing Commission little guidance in this area. When the Commission comes back with its proposals, Congress should take a close look at them.

The attitudes toward crime taken by the members of the Sentencing Commission will be the most significant factor in determining the direction of punishment. The attitudes of Federal judges will be another. But at no point does Congress take its statutorily mandated maximum sentences with enough seriousness to create some numerical nexus, however tenuous, between statutory sentences and actual sentences.

We can only hope that the Sentencing Commission heeds our suggestion that violent, heinous, or repetitive criminal conduct be dealt with more severly than is the case under current law.

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